SELECTED GUIDELINE APPLICATION DECISIONS FOR THE SIXTH CIRCUIT

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
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This document contains annotations to Sixth Circuit judicial opinions addressing some of the most commonly applied federal sentencing guidelines. The document was developed to help judges, lawyers and probation officers locate relevant authorities when applying the federal sentencing guidelines. It does not include all authorities needed to correctly apply the guidelines. Instead, it presents authorities that represent Sixth Circuit jurisprudence on selected guidelines. The document is not a substitute for reading and interpreting the actual guidelines manual; rather, the document serves as a supplement to reading and interpreting the guidelines manual.

CHAPTER ONE: *Authority and General Application Principles*

Part B General Application Principles

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Campbell, 279 F.3d 392 (6th Cir. 2002). "According to U.S.S.G. § 1B1.3(a)(1)(B), a base offense level should be determined on the basis of the following:

> [I]n the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

Application Note Two . . . sets out a two-pronged test that must be satisfied before a defendant is held accountable for the conduct of others: (1) the conduct must be in furtherance of the jointly undertaken criminal activity; and (2) the conduct must be reasonably foreseeable in connection with that criminal activity. The Note further states that:

> In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and the objectives embraced by the defendant's agreement).

. . . [T]his subsection requires that the district court make particularized findings with respect to both the scope of the defendant's agreement and the foreseeability of his co-conspirators' conduct before holding the defendant accountable for the scope of the entire conspiracy. Without the requirement that the district court make these two particularized findings, we expose

defendants to being sentenced on conspiracies whose activities they did not agree to jointly undertake or could not foresee. Averting sentences based on such conspiracies that are potentially overbroad in scope is one of the specific purposes of § 1B1.3(a)(1)(B)." *Campbell*, 279 F.3d at 399-400 (citations omitted).

In this case, the Sixth Circuit found that the district court made particularized findings about the second part of the test—the foreseeability prong. In particular, the district court found that the defendant was aware that the conspiracy was broader than the three transactions with which he was involved and that, as a result, the conduct of the conspiracy as a whole was reasonably foreseeable to the defendant. But the record did not indicate that the district court addressed the first part of the test—whether the acts of the co-conspirators were within the scope of the defendant's agreement. Although the government argued that the defendant's awareness of the broader conspiracy satisfies the first part of the test, the Sixth Circuit rejected that argument, explaining that the mere fact that the defendant was aware of the scope of the overall operation is not enough to hold him accountable for the activities of the whole operation.

United States v. Meacham, 27 F.3d 214 (6th Cir. 1994), *cert. denied*, 519 U.S. 1017 (1996). In this opinion, the court of appeals explained that the district court must make individualized findings about the scope of a drug conspiracy and the duration and nature of each defendant's participation in the scheme. "'[B]ecause 'the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy,' a sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy.'" *Meacham*, 27 F.3d at 217 (citations omitted).

United States v. Partington, 21 F.3d 714 (6th Cir. 1994). "Conduct which forms the basis for counts dismissed pursuant to a plea bargain may be considered in determining the base offense level under the guidelines." *Partington*, 21 F.3d at 717. In this case, the district court applied a 6-level enhancement to a sentence for illegal firearms dealing based on a sawed-off shotgun that was the basis of a dismissed count. The shotgun was missing a bolt and the defendant retained the weapon for parts. In considering whether possession of the sawed-off shotgun qualified as relevant conduct, the court of appeals analogized to law involving drug distribution charges and explained that for the purposes of applying the guidelines, no real difference exists between the possession of illegal drugs and the possession of firearms. The court of appeals explained that "[a]lthough the type of contraband differs, the same rationale applies." *Id*. at 718. The court of appeals recognized that possession of a particular firearm does not always qualify as relevant conduct when a defendant is convicted of illegal firearms dealing, but determined that the evidence supported the district court's finding that "although the weapon was not actively marketed by defendant during his discussion with DEA agents prior to his arrest, he possessed the weapon, and the offense of conviction was intertwined with the possession and sale of firearms." *Id*. at 719. The court of appeals explained as follows:

> Defendant need not have actually attempted to sell the sawed-off rifle to DEA agents, nor have kept the rifle in operating condition, in order for it to be

> considered part of his firearms dealings. It is sufficient that the rifle was in the location where defendant conducted some of his illegal firearms transactions and that it could easily be made operable. Under these circumstances, possession of the rifle, a crime with which defendant was charged and which is covered by the same guideline section as the offense of conviction, could clearly be found to be part of the same course of conduct as the crime of dealing in firearms.

Id.

United States v. Pierce, 17 F.3d 146 (6th Cir. 1994). "[C]onduct that cannot be prosecuted under the applicable statute of limitations can be used to determine relevant conduct, for the circuit has held that even conduct that comprised an offense for which the defendant has been acquitted may be so used." *Pierce*, 17 F.3d at 150. Here, the court of appeals considered this rule in a tax evasion case.

United States v. Ukomadu, 236 F.3d 333 (6th Cir. 2001). "With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." *Ukomadu*, 236 F.3d at 341. In this case, the defendant was convicted of possession of heroin with intent to distribute. The defendant objected to the drug quantity determination of 293.3 grams of heroin that was the basis for his sentence. Before the package of heroin was in the defendant's possession, the customs officials had removed most of the heroin from the package, leaving behind approximately 6 grams in the package, later possessed by the defendant. On appeal, the Sixth Circuit disagreed and held that because the defendant met the requirements of §1B1.3, Application Note 2, he was responsible for the entire 293.3 grams of heroin because it was "within the scope of the criminal activity he jointly undertook."

§1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline (Policy Statement)

United States v. Dullen, 15 F.3d 68 (6th Cir. 1994). "When the United States Sentencing Commission lowers a particular sentencing range, by amending its [g]uidelines after a convict's sentencing date, a court may act to modify the penalty that it had imposed earlier under the stricter regime. However, such a modification is proper only 'if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.' Indeed, '[t]he principle that the [g]uidelines [m]anual is binding on federal courts applies as well to policy statements [issued by the Sentencing Commission].' In this case, [the court of appeals found] a clear policy statement in [§1B1.10(a)]:

> Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines [that is specifically enumerated in U.S.S.G. §

> 1B1.10(d)], a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.

Subsection (d) enumerates a number of amendments that apply retroactively." *Dullen*, 15 F.3d at 69-70 (citations omitted). The court of appeals explained that the amendment to §3E1.1 that the defendant sought to apply retroactively—Amendment 459—was not listed as a retroactive amendment.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Davis, 397 F.3d 340, 346-47 (6th Cir. 2005). "Generally, the district court is instructed to apply the version of the [g]uidelines in place at the time of sentencing. However, the [g]uidelines clearly instruct the court to apply the version in place at the time the defendant's offense was committed if applying the current [g]uidelines would amount to a violation of the ex post facto clause. . . . The ex post facto clause is implicated where a law punishes retrospectively; '[a] law is retrospective if it changes the legal consequences of acts completed before its effective date.'" *Davis*, 397 F.3d at 346-47 (citations omitted). The defendant in this case committed his offense in 1991, but was punished under the 2002 version of the guidelines. He complained on appeal that he should have been sentenced under the 1991 version because the application of the 2002 version resulted in a sentence that was 3 months longer than what could have been imposed under the 1991 version. The Sixth Circuit agreed, observing that the district court sentenced the defendant at the low end of the guidelines range under the 2002 version and may have sentenced the defendant to the low end of the guidelines range under the 1991 version. Consequently, an ex post facto problem existed and the district court should have sentence the defendant under the 1991 version.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A1.2 Second Degree Murder

United States v. Milton, 27 F.3d 203 (6th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). "First degree murder is defined as any murder 'perpetrated by poison, lying in wait, or any kind of wilful, deliberate, malicious, and premeditated killing.' Second degree murder is defined as any other murder. Second degree murder, therefore, requires a finding of malice aforethought." *Milton*, 27 F.3d at 206 (citations omitted). In this appeal, the Sixth Circuit determined that the defendant's actions of shooting into the back window of a person's car to scare him established malice aforethought sufficient to hold the defendant accountable for second degree murder because the defendant's conduct represented a gross deviation from a reasonable standard of care.

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Weekley, 130 F.3d 747 (6th Cir. 1997). "Section 2A3.1 . . . provides for a base offense level of 27. In addition, section 2A3.1(b)(1) provides: 'If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.' The Commentary following that section provides:

> The means set forth in 18 U.S.C. § 2241(a) or (b) are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

Weekley, 130 F.3d at 754 (citations omitted). In this case, the court of appeals determined that the application of the enhancement was appropriate because the defendant brandished a razor mounted on a shaft while molesting a young boy. The court of appeals characterized a razor mounted on a shaft as a dangerous weapon under §1B1.1.

§2A3.2 Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

United States v. Chriswell, 401 F.3d 459 (6th Cir. 2005). The enhancement under §2A3.2(b)(2)(B) for unduly influencing a minor to engage in prohibited sexual conduct does not apply where the victim was an undercover officer acting as a minor. The Sixth Circuit noted that the guidelines specifically define victim to include undercover agents posing as underage children, but concluded that this definition should not apply in provisions in which such a definition does not make sense.

§2A6.1 Threatening or Harassing Communications

United States v. Newell, 309 F.3d 396 (6th Cir. 2002). "The pivotal inquiry when determining the appropriateness of a § 2A6.1(b)(1) enhancement is whether the defendant intended to carry out the threat, and the likelihood that he would actually do so. Accordingly, essential to the determination of whether to apply the six-point enhancement is a finding that a nexus exists between the defendant's conduct and the threats that form the basis of the indictment." *Newell*, 309 F.3d at 400 (citation omitted). In this case, the defendant was convicted for transmitting threatening interstate communications in violation of 18 U.S.C. § 875(c). The district court applied a six-level enhancement to the defendant's sentence pursuant to §2A6.1(b)(1). On appeal, the Sixth Circuit determined that the application of the six-level enhancement was based on a finding that a nexus existed between the defendant's conduct and

the threats that form the basis of the indictment. The Sixth Circuit held that the defendant's purchase and possession of a .32 caliber handgun in close temporal proximity to the making of the threats constituted conduct that sufficiently supported a six-level enhancement under §2A6.1(b)(1).

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

United States v. Raithatha, 385 F.3d 1013 (6th Cir. 2004) , *j. vacated on other grounds*, 543 U.S. 1136 (2005). "[L]oss can be attributed to a [d]efendant based on a finding of actual loss or intended loss, and a finding of intended loss is not limited to those losses possible to inflict, or those gains possible for a [d]efendant to achieve." *Raithatha*, 368 F.3d at 629. The defendant here contended the loss calculation for under §2B1.1. The defendant ran a Medicare scheme in which he ordered unnecessary tests and billed Medicare fraudulently in order to recover a profit. First, the defendant argued that there was no evidence to support that the defendant ordered all fraudulent transactions, and that not all of the transactions were fraudulent. However, the government stated specifically at the sentencing hearing that these legitimate transactions were not counted in the loss calculation. In addition, the calculation of intended loss from the ten most frequently billed insurance companies does not disrupt the calculation. The defendant failed to establish that the loss calculation unacceptable. Secondly, the defendant argued that no loss should be attributed to him because it was impossible for him to have caused Medicare any loss. However, intended loss is not limited to those losses possible to inflict. The defendant's intentions to mislead Medicare dictate that the defendant be held accountable for intending to cause the amount of loss about which he intentionally lied. Sentence of the district court affirmed.

United States v. Sosebee, 419 F.3d 451 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 843. "Calculations of loss under the sentencing guidelines are governed by . . . § 2B1.1. The commentary notes to § 2B1.1 state that 'fair market value' is ordinarily the proper determination of loss. We have developed a two-step process to guide district courts in determining the amount of loss. The initial determination is whether a market value for the stolen property is readily ascertainable. Second, if such a market value is ascertainable, we must determine whether that figure adequately measures either the harm suffered by the victim or the gain to the perpetrator, whichever is greater.

The standard test for determining fair market value is to look at 'the price a willing buyer would pay a willing seller at the time and place the property was stolen.'" *Sosebee*, 419 F.3d at 456 (citations omitted).

United States v. Williams, 355 F.3d 893 (6th Cir. 2003). "Section 2B.1.1(b)(9)(C)(i) . . . authorizes a two-level increase in a defendant's base offense level in cases in which the defendant has unlawfully used any means of identification without authorization to produce or obtain any other means of identification. If after the two-level increase, the offense level is less than level 12, then the offense level is to be increased to level 12. The minimum offense level of 12 accounts for the seriousness of the offense as well as the difficulty in detecting the crime prior to certain harms occurring, such as a damaged credit rating or an inability to obtain a loan. The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, such as harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense." *Williams*, 355 F.3d at 898 (citations omitted). On appeal, one of the defendants argued that the bank loan number was not the equivalent of a false identification, and that she purchased the entire loan package, not a social security number. Another defendant argued that the enhancement did not apply to his conduct because he obtained the bank loan in his own name. The court noted that a bank loan number was an account number that can be used to obtain money and was a "means of identification" as that term was defined in 18 U.S.C. § 1028. Thus, according to the defendants, their situation was more analogous to making a purchase with a stolen credit card. The court further noted that a social security number was clearly defined as a "means of identification" and its use to obtain a loan fell within the scope of the statute and the sentencing guidelines even if another form was not used. Accordingly, the district court did not err in finding that the enhancement under §2B1.1(b)(9)(C)(I) applied.

§2B1.2 Receiving, Transporting, Transferring, Transmitting or Possessing Stolen Property (Deleted by consolidation with §2B1.1, effective November 1, 1993)

United States v. Warshawsky, 20 F.3d 204 (6th Cir. 1994). In a case of first impression, the Sixth Circuit addressed the interpretation of "in the business of receiving and selling stolen property," §2B1.2(b)(4)(A), and endorsed the tests set forth in *United States v. Esquival*, 919 F.2d 957, 959 (5th Cir. 1990), and *United States v. Braslawsky*, 913 F.2d 466, 468 (7th Cir. 1990). Sentencing courts should examine "the defendant's operation to determine: (1) if stolen property was bought and sold, and (2) if stolen property transactions encouraged others to commit property crimes."

§2B3.1 Robbery

United States v. Hazelwood, 398 F.3d 792 (6th Cir. 2005). "The current Application Note 4 is clear that enhancements stemming from the 'possession, brandishing, use, or discharge' of a firearm related to the underlying offense cannot be imposed for acts related to the conduct for which a defendant was also convicted under 18 U.S.C. 924(c)." *Hazelwood*, 398 F.3d at 800. During a bank robbery, the defendant pointed a semiautomatic pistol at bank tellers and stated "Do what I say or I will kill you." The Sixth Circuit explained that the enhancement was improper because the threat of death related to the defendant's brandishing of a firearm.

United States v. Moerman, 233 F.3d 379 (6th Cir. 2000). At the time of this appeal, §2B1.2 called a 6-level increase if a firearm was "otherwise used" and a 5-level increase if a firearm was brandished, displayed, or possessed. In this case, the defendant pled guilty to three counts of armed bank robbery. In each robbery, the defendant did not directly threaten the tellers or the customers with the use of the firearm if they did not comply with the defendant's demands. On appeal, the defendant argued that the six-level enhancement for "otherwise using" the firearm under §2B3.1 did not apply to his case because he only "brandished" the firearm and therefore should have received only a 5-level enhancement on each of the two counts. The Sixth Circuit agreed. In one bank robbery, the defendant pointed the firearm in a threatening manner. In another bank robbery, the defendant moved a customer aside with the barrel of the firearm without an accompanying threatening statement. The court held that the conduct of the defendant did not go beyond brandishing the weapon and reversed and remanded the case to recalculate the sentence using the 5-level increase for brandishing the weapon.

United States v. Smith, 320 F.3d 647 (6th Cir. 2003), *cert. denied*, *Nichols v. United States*, 538 U.S. 1023 (2003). "In selecting the applicable guideline, § 1B1.2(a) directs the court to use the guideline referenced in the Statutory Index (Appendix A) for the offense of conviction. 'In the case of a particular statute that proscribes a variety of conduct that might constitute the subject of different offense guidelines, the Statutory Index may specify more than one offense guideline for that particular statute, and the court will determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted.' Thus . . . the guidelines provide that a conviction of 18 U.S.C. § 2113(a) may be sentenced under § 2B3.1 or § 2B3.2." *Smith*, 320 F.3d at 656-57 (citations omitted). In this case, the defendant was convicted of armed bank extortion in violation of 18 U.S.C. §§ 2113(a) and (d) as well as bank robbery with forced accompaniment under §§ 2113(a) and (e). The defendant maintained that §2B3.2 ("Extortion by Force or Threat of Injury or Serious Damage")—which has a lower base offense level—applied to his conduct rather than §2B3.1. The court of appeals explained that "[s]ection 2B3.1(b)(1) of the 'Robbery' guideline provides for a specific offense characteristic concerned with the type of institution robbed. In contrast, no offense characteristic under the 'Extortion by Force or Threat of Injury or Serious Damage' guideline contemplates the harm to a financial institution." *Id*.

The defendant did not limit his conduct to threatening future violence unless the victim were forced to "pay up." "From the outset, the conspiracy was directed at accomplishing one overarching objective—a bank robbery. The events that [the defendant] characterize[d] as indicative of extortion—invading branch managers' homes, threatening their family members, and promising the release of their husbands in return for money—were merely intermediate steps toward completing the ultimate goal of robbing a bank." *Id*. at 657.

United States v. Winbush, 296 F.3d 442 (6th Cir. 2002). In this appeal, the Sixth Circuit determined that a robber's note saying "I have a gun" constituted a threat of death under §2B3.1(b)(2)(F), warranting a two-level enhancement.

United States v. Yagar, 404 F.3d 967 (6th Cir. 2005). "The term 'actual loss' is defined as 'the reasonably foreseeable pecuniary harm that resulted from the offense.' Furthermore, 'pecuniary harm' is defined as 'harm that is monetary or that otherwise is readily measurable in money' and 'does not include emotional distress, harm to reputation, or other non-economic harm.'" *Yagar*, 404 F.3d at 970 (citations omitted). In this case, the 2-level enhancement under §2B1.1(b)(2)(A) did not apply because some of the victims of a fraudulent scheme involving stolen checks only temporarily lost their funds because their banks fully reimbursed them for their financial losses.

§2B5.1 Offenses Involving Counterfeit Bearer Obligations on the United States

United States v. Hover, 293 F.3d 930 (6th Cir. 2002). "The plain language of [§2B5.1] does not require that a defendant possess express knowledge of any acts occurring outside of the United States. Instead, it provides for a two-level enhancement based solely on the fact that 'any part' of the act occurred outside of the United States. There is no basis for a knowledge requirement to be read into the [g]uideline." *Hover*, 293 F.3d at 933. In this case, the Sixth Circuit rejected the defendant's argument that the district court improperly increased his offense level using conduct that occurred outside of the United States based on the plain language of the guideline.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Darwich, 337 F.3d 645 (6th Cir. 2003). "[Section] 2D1.1(b)(1) orders sentencing courts to increase the defendant's sentence by two levels '[i]f a dangerous weapon (including a firearm) was possessed.' The sentencing court is instructed to apply the two-level enhancement when a weapon is present, 'unless it is clearly improbable that the weapon was connected with the offense.' This requirement for a strict sentence enhancement 'reflects the increased danger of violence when drug traffickers possess weapons.' The government bears the burden of showing by a preponderance of the evidence that the defendant either 'actually or constructively possessed the weapon.' 'Constructive possession of an item is the ownership, or dominion or control over the item itself, or dominion over the premises where the item is located.' Once the government meets its burden of showing that the defendant possessed a weapon, a presumption arises that 'the weapon was connected to the offense.' The burden then shifts to the defendant to 'show that it was 'clearly improbable' that the weapon was connected with the crime.' The district court applies the two-level enhancement if the defendant fails to meet this burden." *Darwich*, 337 F.3d at 665 (citations omitted). In this appeal, the defendant argued that the weapons found in his home were not sufficiently linked to his drug activities enough to warrant application of the two-level enhancement under §2D1.1(b)(1). The Sixth Circuit explained that while the defendant might be correct in his position that the government failed to demonstrate how these weapons were connected to the Canfield Market activities, the weapons surely could have been connected to the bagging operation that took place in the

defendant's home. Accordingly, the Sixth Circuit determined that the district court did not err in applying the two-level firearm enhancement.

United States v. Galvan, Nos. 04-1741 & 05-1188, 2006 WL 1912739 (6th Cir. July 13, 2006). "The [g]uidelines instruct a court to add two points to a defendant's base offense level '[i]f a dangerous weapon (including a firearm) was possessed.' The enhancement applies whether a defendant actually or constructively possessed the weapon. A defendant constructively possesses a gun if he has "'ownership, or dominion or control over the [firearm] itself, or dominion over the premises where the [firearm] is located."'" *Galvan*, Nos. 04-1741 & 05-1188, 2006 WL 1912739, at *4. In this case, the Sixth Circuit determined the enhancement applied where the defendant's co-conspirator testified that the defendant told him to "bring a gun" to a scheduled drug deal. The co-conspirator, in turn, told another co-conspirator to bring the weapon and he did.

United States v. Gardner, 417 F.3d 541 (6th Cir. 2005). "Where the quantity of drugs at issue cannot be easily determined, the district court may estimate the amount, but the 'court must err on the side of caution.'" Gardner, 417 F.3d at 546 (citation omitted). In this appeal, the defendant challenged whether the district court erred in considering approximately $16,000 as the proceeds of crack cocaine sales. The proceeds were found in the defendant's vehicle at the time of his arrest. Contrary to the defendant's position that $11,000 of the $16,000 were proceeds from the sale of furniture, the Sixth Circuit found sufficient evidence that the money came from the sale of crack cocaine. A later search of the defendant's apartment found jars and cooking utensils covered with cocaine residue, as well as packaging material and more crack cocaine. There was no evidence to support the defendant's claim that the cash was from the sale of other items.

United States v. Gill, 348 F.3d 147 (6th Cir. 2003). "Uncharged conduct may be considered in calculating the sentencing range under the [s]entencing [g]uidelines only if the conduct is 'relevant.'" *Gill*, 348 F.3d at 153. In this case, "the defendant was charged with possession with intent to distribute a controlled substance under 21 U.S.C. § 841(a), which required the sentencing court to refer to U.S.S.G. § 2D1.1 to obtain the base offense level. The crime of simple possession, which is defined by 21 U.S.C. § 844(a), calls for the use of a different guideline section, U.S.S.G. § 2D2.1. Under Section 2D1.1, the base offense level for a defendant whose crime does not involve death or serious bodily injury resulting from the use of a controlled substance is determined exclusively by the drug quantity table. The amount entered into that table, however, is not limited to the quantity involved in the defendant's crime. The [g]uidelines [m]anual directs that '[t]ypes and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See§ 1B1.3(a)(2) (Relevant Conduct).' In order to determine whether drug quantities possessed for personal use should be included in the tally when establishing the base offense level for a distribution- or trafficking-type crime under [s]ection 2D1.1, the sentencing court must follow the path laid out in the [g]uidelines [m]anual to the definition of 'relevant conduct' found in [s]ection 1B1.3. There, the Sentencing Commission states that the base offense level in cases of this sort is determined 'on the basis of . . . all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the

commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.' In addition, 'with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts,' relevant conduct includes 'all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.' Offenses characterized by the grouping rule contained in [s]ection 3D1.2 are those that 'involv[e] substantially the same harm.' Pursuing that definition further, we learn that multiple counts involve the 'same harm' '[w]hen the offense level is determined largely on the basis of . . . the quantity of a substance involved.' However, the [g]uidelines [m]anual lists the offenses that may be grouped under this subsection, and, with respect to drug offenses, includes only those offenses covered by '§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, [and] 2D1.13.' Simple possession of a controlled substance, covered by [s]ection 2D2.1, is not included in this list." *Gill*, 348 F.3d at 151-52.

United States v. Holmes, 961 F.2d 599 (6th Cir.), *cert. denied*, 506 U.S. 881 (1992). In the appeal, the Sixth Circuit held that the enhancement for cases involving 50 or more marijuana plants does not violate a defendant's right to equal protection.

United States v. Johnson, 344 F.3d 562 (6th Cir. 2003). "The sentencing guidelines provide that a defendant's base offense level should be increased by two levels if the court determines that he possessed a dangerous weapon during the commission of an offense involving drugs. The government must prove by a preponderance of the evidence 'that (1) the defendant actually or constructively 'possessed' the weapon, and (2) such possession was during the commission of the offense.' 'Constructive possession of an item is the 'ownership, or dominion or control' over the item itself, 'or dominion over the premises' where the item is located.' If the offense committed is part of a conspiracy, it is sufficient if the government establishes 'that a member of the conspiracy possessed the firearm and that the member's possession was reasonably foreseeable by other members in the conspiracy.' Once it has been established by the government that a defendant was in possession of a firearm, the burden shifts to the defendant to establish that 'it is clearly improbable that the weapon was connected to the offense.' The 'safety-valve' provision of the sentencing guidelines states that '[i]f the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.'" *Johnson*, 344 F.3d at 565 (citations omitted). In this appeal, the Sixth Circuit explained that the district court properly enhanced defendant-Johnson's sentence by two levels because the government proved by a preponderance of the evidence that it was reasonably foreseeable by defendant-Johnson that a co-conspirator would possess a firearm during the commission of a drug conspiracy. The Sixth Circuit further held that the district court's determination that the defendant possessed a firearm rendered him ineligible to receive a two-level safety valve reduction because he did not meet the conditions of §5C1.2(a)(2). Consequently, the Sixth Circuit affirmed the sentence.

United States v. Owusu, 199 F.3d 329 (6th Cir. 2000). Each defendant is accountable for all quantities of drugs with which he is directly involved and, in the case of jointly undertaken criminal activity (conspiracies), all reasonably foreseeable drug quantities within the scope of his agreement.

United States v. Powers, 194 F.3d 700 (6th Cir. 1999). When a defendant in an LSD case is entitled to be sentenced under the "safety valve" established by 18 U.S.C. § 3553(f), statutory directions as to how the amount of the LSD should be determined do not control. Rather, in such cases, the LSD is to be weighed under the formula expressed in Amendment 488 to the federal sentencing guidelines. The guideline method is used because qualifications as a "safety valve" defendant removes that defendant from the scope of statutory (mandatory minimum) penalties.

United States v. Stevens, 25 F.3d 318 (6th Cir. 1994). "The drug quantity table in § 2D1.1(c) . . . is used to determine the base offense level for defendants guilty of drug crimes. At each level of the table is a corresponding weight range for marijuana. For a defendant apprehended with a particular weight of marijuana leaves, determining the base offense level can be as easy as finding the level with which that weight corresponds.

When a person is apprehended with marijuana plants, however, the appropriate weight of the marijuana cannot be determined simply by weighing the plants, for Congress has criminalized possession of only consumable portions of the plant and thereby excepted the mature stalk. Following the drug quantity table is a provision that explains how to treat marijuana plants for sentencing purposes, which [the Sixth Circuit] refer[s] to as the 'equivalency provision.' . . . When the equivalency provision is applied to 50 or more plants, it metes out a punishment that is usually much greater than that given for the consumable marijuana those plants produce. As the [g]uidelines state, the 'average yield from a mature marihuana plant equals 100 grams of marihuana.' Because of the equivalency provision, then, a person caught with 100 marijuana plants is sentenced as if he had been found with 100 kilograms of marijuana, even though the plants would probably produce only about 10 consumable kilograms of the drug." *Stevens*, 25 F.3d at 320-21 (citations omitted). In this case, the district court erred because it calculate the drug quantity on the number of marijuana plants the defendant's supplier grew instead of on the weight of the marijuana the two conspired to possess.

United States v. Vasquez, 352 F.3d 1067 (6th Cir. 2003), *cert. denied*, 541 U.S. 1004 (2004) . "Note 12 requires that courts use the agreed-upon quantity to determine the offense level, unless the defendant did not intend to provide or was not reasonably capable of providing the agreed-upon quantity. . . .[O]nce the government establishes the agreed-upon quantity, the defendant has the burden of proving that he or she either did not intend to provide or was not reasonably capable of providing that amount. " *Vasquez*, 352 F.3d at 1071-72. In this case, the Sixth Circuit discussed the factors that might indicate a defendant's intent and capability of providing an agreed-upon drug amount regardless of his role in the transaction; that is, whether the defendant engaged in serious negotiations rather than mere "idle talk"; whether the defendant participated in similar transactions on prior occasions; and whether the defendant hesitated before agreeing to the transaction.

United States v. Ward, 190 F.3d 483 (6th Cir. 1999), *cert. denied, Morris v. United States*, 528 U.S. 1118 (2000). Even drug quantities involved in an acquitted count can be counted for sentencing purposes when the defendant's involvement with the drugs is proven by a preponderance of the evidence.

United States v. Webb, 335 F.3d 534 (6th Cir. 2003). "Under Sentencing Guidelines § 2D1.1(b)(1), the offense level may be increased by two levels if a dangerous weapon was possessed during an offense involving drugs. The commentary provides that the enhancement 'should be applied if the weapon was present, unless it was clearly improbable that the weapon was connected with the offense.' To start with, the government must prove by a preponderance of the evidence that the defendant actually or constructively possessed the weapon and that such possession was during the commission of an offense involving drugs. The burden then shifts to the defendant to prove that any connection between the drug offense and the weapon is clearly improbable." *Webb*, 335 F.3d at 537. In this appeal, the defendants challenged the sufficiency of the evidence supporting the enhancement by arguing that the government did not present sufficient evidence to establish that they were aware of the presence of the gun in their store. The Sixth Circuit observed that although the defendant's wife testified that the gun belonged to her and that she kept the gun for protection, she was unable to identify the type of gun found at the defendant's place of business or even describe what the gun looked like. Furthermore, the gun was found at the defendants' adjacent business location where all of the undercover drug transactions occurred. Based on this evidence, the Sixth Circuit determined the government had met its burden and the defendants failed to demonstrate that the gun's connection with the offense was clearly improbable.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit
(Deleted by consolidation with §2B1.1, effective November 1, 2001)

United States v. Flowers, 55 F.3d 218 (6th Cir.), *cert. denied*, 516 U.S. 901 (1995). In its first published opinion addressing the issue, the appellate court held that the amount of loss in a check-kiting case is determined at the time the crime "was detected, rather than at sentencing, and that the defendants convicted of bank fraud by check kiting will not be permitted to buy their way out of jail by subsequently making voluntary restitution." The fact that the check-kiters made restitution to the bank prior to sentencing cannot alter the "fact of loss."

United States v. Sanders, 95 F.3d 449 (6th Cir. 1996). "[Section] 2F1.1(b), which applies to fraud offenses, requires the district court to increase the defendant's base offense level depending on the amount of loss caused by the fraud at issue." *Sanders*, 95 F.3d at 454. This case involved a fraudulent insurance scheme. In calculating the amount of loss, the district court relied on the total amount of premiums collected by the conspiracy. On appeal, the defendant argued that only the amount of the victim's actual loss should be considered for sentencing. The court of appeals disagreed, explaining that "in fraudulent loan application cases, the victim may recoup some of the losses by selling collateral that the defendant used to secure the loan. In a fraudulent insurance scheme . . . , the victims are not left with any collateral to sell. The Sentencing Commission . . . [made] clear this distinction between secured loan fraud cases and other fraud cases in [the application notes to former §2F1.1]. Application Note 7(b) applie[d] only to fraudulent loan application and contract procurement claims and state[d] that the loss in those types of cases should be valued at the amount owed on the loan reduced by the amount recovered by the victim through the sale of assets used to secure the loan." *Id.* at 455 (citations

omitted). The Sixth Circuit explained that the Application Note clearly shows that the amount of loss should be the amount of premiums collected, and the entire amount involved in the conspiracy is attributable to the defendant, because "all the conspirators' activities were reasonably foreseeable' to the defendant.

United States v. Scott, 74 F.3d 107 (6th Cir. 1996). "[Section §2F1.1] assigns a base offense level of six and then increases the offense level for different loss amounts beginning with $2,000. . . . Subsection (b) of Application Note 7 states that in fraudulent loan application and contract procurement cases, the actual loss is offset by any collateral pledged to secure the loan or any amount the lending institution has recovered or can expect to recover." *Scott*, 74 F.3d at 111. In this case, the defendant used his position as a bank employee to defraud the bank, causing $75,546.22 (including $1709 in interest on the account) to be placed into fictitious accounts that the defendant created. Prior to the termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled him to a $64,712.40 commission. After he completed the negotiation, the bank retained the commission. At sentencing, the district court determined that the actual loss to the bank was $74,546.22. The defendant argued that the actual loss was only $9,834.60 since the bank received $64,712.40 from his commission. The court of appeals observed that the defendant's argument relied on the notion that collateral secured by the creditor in fraudulent-loan-transaction cases offsets the amount of the loss. The court's explanation for why this argument fails follows:

> The fraudulent lease transactions here, like check-kiting, are distinct from fraudulent loan transactions in that the victim of the fraud was not given collateral to secure the fraudulently obtained funds. [The defendant's] commission was not the equivalent of collateral because it was earned and offered after the offense was detected. Subsequently making voluntary restitution is simply not the equivalent of posting collateral. Because the commission was earned after [the defendant] was caught, it is not an appropriate offset to the actual amount of loss and the district court properly calculated the loss for sentencing purposes at $74,546.22.

Id. at 112.

United States v. Sparks, 88 F.3d 408 (6th Cir. 1996). "Under the Commentary, [the Sixth Circuit] has concluded that the amount of loss in a bank fraud case should ordinarily be determined as of 'the time the crime was detected rather than at sentencing.' The word 'loss' means and includes 'money which others may pay but are not obligated to pay on behalf of the defendant,' although a loss ordinarily 'should not include amounts that a bank can and does recover by foreclosure, setoff, attachment, simple demand for payment, immediate recovery from the actual debtor and other similar legal remedies. . . .' In [this] case the debt was not repaid immediately by simple demand or through foreclosure, but by a third party more than a year after the discovery of the fraud. That [the defendant's] payments reduced the amount of the bank's ultimate loss does not alter the amount of 'actual loss' determinable at the time the crime was detected, because, at that time, the bank had no realistic expectation of 'immediate recovery [either] from the actual debtor,' or through 'legal remedies.'

Moreover, the fraud here was not based primarily on a misrepresentation by the defendant as to the 'value of his assets,' as provided in the example found in Commentary ¶ 7(b) of Guideline § 2F1.1. Thus, the language of this example in Commentary ¶ 7(b) is not applicable to the present case. Consequently, the amount of loss attributable to the defendant was not reduced by [the defendant's] voluntary payments long after the discovery of the fraud and [the district court] was correct that these amounts should be included in the 'amount of the loss' as under . . . § 2F1.1.

The amount of loss may be reduced by the amount that the bank has recovered or may expect to recover from any assets pledged to secure a loan. However, it is undisputed [in the case] that the contested loans were not effectively secured." *Sparks*, 88 F.3d at 409 (citations omitted).

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors & Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

United States v. Gawthrop, 310 F.3d 405 (6th Cir. 2002). "Nothing in § 2G2.2(b)(4) or its current commentary requires a temporal nexus between any instances of sexual abuse or exploitation." *Gawthrop*, 310 F.3d at 414. In this case, the defendant was convicted of receiving child pornography over the Internet in violation of 18 U.S.C. § 2252(a)(2). On appeal, the defendant argued that the district court erred in applying a five-level enhancement under §2G2.2(b)(4) because his 1988 conviction for sexually abusing his daughter was too attenuated from the 1999 sexual abuse of his granddaughter to form a "pattern of activity" under §2G2.2(b)(4). The defendant claimed that there must be a sufficient temporal nexus between instances of abuse or exploitation to establish a pattern of such activity. The issue on appeal was whether the eleven-year span between these two events precluded each from being considered as a part of a pattern of such activity. The Sixth Circuit explained that the fact that the defendant's 1988 conviction could not be considered as part of his criminal history under §4A1.2 was of no consequence because §2G2.2(b)(4) does not require a temporal nexus between any instances of sexual abuse or exploitation. The abuse of his daughter and granddaughter—even though the events occurred eleven years apart—clearly constituted a "pattern of activity involving the sexual exploitation of a minor" sufficient to justify the district court's adjustment to his offense level.

Part J Offenses Involving the Administration of Justice

§2J1.2 Obstruction of Justice

United States v. Kimble, 305 F.3d 480 (6th Cir. 2002). "When sentencing a defendant under § 2J1.2, the district court is 'required to calculate the base offense level for the offense of conviction under both the 'Obstruction of Justice' guideline, U.S.S.G. § 2J1.2, and the 'Accessory After the Fact' guideline, § 2X3.1, and apply the greater of the two sentences.' It is not necessary for the government to prove facts sufficient to establish a defendant's guilt as an 'Accessory After the Fact' in order to impose a sentence under § 2X3.1; the section merely serves as a tool to calculate the base offense level 'for particularly serious obstruction offenses.' In fact, proof of the underlying offense is immaterial, since the point of the cross-reference is to 'punish more severely . . . obstruction of . . . prosecutions with respect to more serious crimes." *Kimble*, 305 F.3d at 485 (citations omitted). In this case, the defendant argued that the district court should have applied the §2J1.2 Obstruction of Justice Guideline without also applying the §2X3.1 cross-reference provision. The court of appeals explained that application of the §2X3.1 cross-reference provision is mandatory and the defendant's claim that he was not an accessory after the fact to the offense was irrelevant because he did not have to be guilty of the crime referenced in §2X3.1 for the higher sentence to apply.

United States v. Levy, 250 F.3d 1015 (6th Cir.), *cert. denied*, 534 U.S. 941 (2001). "[Section] § 2J1.2(a) provides the base offense level for obstruction of justice. The commentary to § 2J1.2 lists 18 U.S.C. § 1513 as one of the statutory provisions to which this guideline applies. . . .[That provision] criminalizes retaliations against witnesses that involve actual or threatened bodily injury. Accordingly, the base level applies to convictions under § 1513 regardless of whether bodily injury occurred. Hence, the eight-level increase under § 2J1.2(b) for specific offense characteristics does not take into account conduct that was already taken into account in setting the base offense level." *Levy*, 250 F.3d at 1017-18.

United States v. Roche, 321 F.3d 607 (6th Cir. 2003). [Section] § 2J1.2(c) encompasses both the investigation and prosecution of a case." *Roche*, 321 F.3d at 610. In this case, the defendant was convicted of bank robbery in an earlier proceeding and submitted three documents to support his request for a downward departure. The trial court imposed a lighter sentence based in part upon the documents. The documents were later shown to be false. Because of the false documents, the defendant was charged with obstruction of justice, and the district court imposed an enhanced sentence for that conviction. The defendant argued that the false documents he submitted to the court for consideration in the sentencing procedure did not obstruct the investigation of the bank robbery case because "the case was for all intents and purposes ended." The court of appeals disagreed because it determined that §2J1.2(c) encompasses both the investigation and prosecution of a case. The court of appeals explained that the sentencing stage of defendant's bank robbery conviction continued to entail the prosecution of the offense. Accordingly, the court upheld the application of the enhancement under §2J1.2©.

§2J1.7 Commission of Offense While on Release

United States v. Lanier, 201 F.3d 842 (6th Cir. 2000). The three-level enhancement under 2J1.7 applies even when the offense committed while the defendant is on release is failure to appear.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Boumelhem, 339 F.3d 414 (6th Cir. 2003). "As used in subsection [ ](b)(5) . . . 'another felony offense' . . . refer[s] to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted." *Boumelhem*, 339 F.3d 427 (citations omitted). In this case, the defendant argued that the enhancement did not apply because his offense of conviction—conspiracy to ship or transport firearms and ammunition in foreign commerce—was 'firearms trafficking offense.'" *Id.* (citations omitted). The court of appeals agreed, explaining that "[a]s used in the application note, 'firearms' is a noun used as an adjective to modify 'trafficking offenses.'" *Id*. (citations omitted). The court of appeals stated that "[c]onspiring to deliver firearms or ammunition for shipment to a common carrier in a manner that would violate 18 U.S.C. § 922(e) would clearly implicate an offense for firearms-related "commercial activity." *Id*. at 427-28. Because the record did not indicate a situation like the one suggested in the application note—where firearms were possessed to facilitate the transport of other firearms—the court of appeals determined that the district court erred in enhancing the defendant's sentence under §2K2.1(b)(5).

United States v. Burke, 345 F.3d 416 (6th Cir. 2003), *cert. denied*, 541 U.S. 966 (2004). "Section 2K2.1(b)(5) instructs a court to increase a defendant's felony offense by four levels '[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense[.]' A court can apply this enhancement 'only . . . if the Government establishes by a preponderance of the evidence that the defendant possessed or used a gun in connection with another felony.' The section 'was created in response to a concern about the increased risk of violence when firearms are used or possessed during the commission of another felony.'" *Burke*, 345 F.3d at 427 (citations omitted). In this case, the court of appeals found sufficient evidence to support the district court's finding that guns were connected to the defendant's VIN flipping operation. "[T]he guns and the VIN paraphernalia were found in close proximity, [and] the illegal operation could have been protected by guns (*e.g.*, to fend off disgruntled car buyers, to deter thieves, and to defend the operation from the police) . . . ." *Id*. at 428.

United States v. Chandler, 419 F.3d 484 (6th Cir. 2005). In this case, the Sixth Circuit determined that the defendant's Tennessee conviction for facilitation of aggravated assault constituted a crime of violence as defined in §4B1.2(a)(1). The Sixth Circuit explained that "by

its nature, [the] conviction for facilitation of an aggravated assault inherently involves conduct that presents a serious potential risk of physical injury to another, and therefore constitutes a crime of violence as defined in § 4B1.2." *Chandler*, 419 F.3d at 488.

United States v. Clay, 346 F.3d 173 (6th Cir. 2003). "'[T]he presence of drugs in a home under a firearm conviction does not ipso facto support application of a § 2K2.1(b)(5) enhancement[;]' the district court must examine the specific facts of the case . . . to determine if the government established by a preponderance of the evidence that the defendant possessed or used a gun in connection with another felony. Although the 'possession of firearms that is merely coincidental to the underlying felony offense is insufficient to support the application of § 2K2.1,' [the Sixth Circuit] has expressly adopted the 'fortress theory, which concludes that a sufficient connection is established if it reasonably appears that the firearms found . . . are to be used to protect the drugs or otherwise facilitate a drug transaction.'" *Clay*, 346 F.3d at 179 (citations omitted).

In this case, the Sixth Circuit determined the evidence was sufficient to support the district court's finding that defendant used or possessed any firearm in connection with a drug offense. "[The defendant] was apprehended in an uninhabited apartment late at night with a bag of cocaine and a large amount of cash on his person. He testified that he was in the apartment to have his hair braided by a woman whom he had met 'on the streets,' although the alleged hairstylist was not in the building. Finally, [the defendant] was carrying a firearm." *Id*.

United States v. Cobb, 250 F.3d 346 (6th Cir.), *cert. denied*, 534 U.S. 925 (2001). "Sentencing guidelines should be read as they are written. As written, § 2K2.1(c)(1)(B) focuses on a defendant's state of mind with respect to some other offense generally rather than on his or her state of mind with respect to some specific offense. If the defendant has the requisite state of mind with respect to that general offense and death results, then § 2K2.1(c)(1)(B) is applicable." *Cobb*, 250 F.3d at 349. In this case, the defendant argued that this "section requires knowledge of some specific offense, [but the Sixth Circuit explained that] the use of the word 'another' as the sole modifier of 'felony offense' does not command such a narrow reading. [The Sixth Circuit stated that] [a]s used in this context, 'another' merely means 'additional, one more.' While appellant would like the section to read 'another specific felony offense,' it does not." *Id*.

United States v. Dalecke, 29 F.3d 1044 (6th Cir. 1994). "[Section] § 2K2.1 . . . identifies possession alone as a crime, separate and apart from unlawful receipt. The guideline's title clearly refers to unlawful receipt and unlawful possession in the alternative. Thus, the Sentencing Commission recognized that the guideline would be applied to crimes involving mere possession of an illegal weapon, regardless of the circumstances under which it was acquired." *Dalecke*, 29 F.3d at 1047 (citation omitted).

United States v. Jackson, 401 F.3d 747 (6th Cir. 5005). Section 2K2.1 "strictly enhances a sentence for possession of a 'stolen' firearm. The enhancement applies 'whether or not the defendant knew or had reason to believe that the firearm was stolen . . . . '" *Jackson*, 401 F.3d at 748. In this case, the defendant maintained that the enhancement was improper because "he had not 'stolen' the gun, but had taken it with the intent to commit suicide. [The defendant] assumed

the gun would eventually be returned to his father, and thus it was not 'stolen.'" *Id*. He contended that "stolen" means taking with the intent to permanently deprive the owner of his property. The Sixth Circuit, however, determined that a defendant's intent to "permanently deprive" is not required in order for a firearm to be "stolen" for the purposes of the guideline.

United States v. Mise, 240 F.3d 527 (6th Cir. 2001). "[Section] § 2K2.1(b)(5) provides for a four level enhancement '[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.'" *Mise*, 240 F.3d at 532 (citation omitted). In this case, the defendant was convicted of manufacturing and possessing an unregistered pipe bomb. On appeal, he argued that the district court erred in applying a four-level enhancement for possession or transfer with knowledge, intent, or reason to believe that the pipe bomb would be used or possessed in connection with another felony under §2K2.1(b)(5). The Sixth Circuit determined that the evidence supported the enhancement. "First, the evidence does not support a conclusion that [the defendant] knew that Ralph Case had abandoned his plan. Indeed, Diane Case testified that [the defendant] came to her home and said, 'I have a pipe bomb that I went ahead and made for Ralph,' thus indicating that [the defendant] made the bomb for Ralph rather than for Norman. [The defendant] also testified that 'a pipe bomb is a destructive device used to hurt people.' [The Sixth Circuit explained that] [a]lthough this is not conclusive alone, combined with the other evidence, it demonstrates [the defendant's] knowledge or intent to produce the pipe bomb with intent to harm another." *Id*. at 532-33.

United States v. Partington, 21 F.3d 714 (6th Cir. 1994), §1B1.3, p. 2.

United States v. Raleigh, 278 F.3d 563 (6th Cir.), *cert. denied*, 535 U.S. 1119 (2002). "[T]he Note 12 exception to the § 2K2.1(b)(4) enhancement d[oes] not apply, because of its plain language, to a defendant who was convicted as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and whose base offense level was determined under § 2K2.1(a)(4)." *Raleigh*, 278 F.3d at 566.

United States v. Wheeler, 330 F.3d 407 (6th Cir. 2003). "While violations of § 922(g)(1) are sentenced under U.S.S.G. § 2K2.1, an enhancement under subsection 2K2.1(a)(2) focuses on Defendant's history of drug offenses, a different aspect of Defendant's conduct than gun possession. Similarly, U.S.S.G. § 4A1.1(d) focuses not on gun possession alone, but on the fact that Defendant violated § 922(g)(1) while under another criminal justice sentence. Finally, the prior drug convictions for which Defendant received criminal history points under U.S.S.G. § 4A1.1 obviously included conduct other than gun possession. Although some of these points are based on the same drug convictions as Defendant's enhancement under § 2K2.1(a)(2), the guidelines expressly provide that '[p]rior felony conviction(s) resulting in an increased base offense level under subsections . . . (a)(2) . . . are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).'" *Wheeler*, 330 F.3d at 413 (citations omitted). In this case, the defendant contended that the district court double-counted because it used the same conduct—his possession of firearms—as the basis for sentencing him under §2K2.1, for enhancing his base offense level under §2K2.1(a)(2), for

adding two criminal history points under §4A.1.1(d), and for adding three additional criminal history points under §4A1.1(a). The court of appeals explained that each of the applicable guidelines emphasizes different aspects of the defendant's conduct other than gun possession or involved expressly-authorized double counting. As a result, the court of appeals did not find impermissible double counting.

United States v. Wynn, 365 F.3d 546 (6th Cir. 2004), *j. vacated on other grounds*, 543 U.S. 1102 (2005). In this appeal, the Sixth Circuit determined that a sawed-off shotgun is a destructive device as defined by Application Note 4 to §2K2.1. The Sixth Circuit stated that "the only types of firearms that are not considered destructive devices for the purposes of . . . § 2K2.1 are those that are used 'solely for sporting, recreational, or cultural purposes,' or, by necessary inference, ones that have a bore of one-half inch or less in diameter." *Wynn*, 365 F.3d at 552.

Part P Offenses Involving Prisons and Corrections Facilities

§2P1.2 Providing or Possessing Contraband in Prison

United States v. Gregory, 315 F.3d 637 (6th Cir.), *cert. denied*, 540 U.S. 858 (2003). In this case, the court of appeals explained that for the purposes of applying the cross-reference in §2P1.2(c)(1), a "transfer" constitutes "distribution."

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

United States v. Rutana, 18 F.3d 363 (6th Cir. 1994). Section 2Q1.2 requires a 4-level increase if the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure. The court of appeals distinguished a "disruption" from an "impact" in this opinion The court of appeals explained that a disruption is something more than a simple interference or interruption. The court of appeals determined that the evidence in this case indicated that the defendant's actions resulted in a disruption of public utility. The defendant discharged hazardous pollutants into a city sewer line that led directly to a waste water treatment plant, causing several bacteria kills at the plant and burning two plant employees. The defendant's discharges caused the plant to violate its clean water permit. As a result of the defendant's actions, the plant could not perform its essential function. The court of appeals stated that the expenditure of substantial sums of money is not required in order to prove that a disruption of a public utility occurred.

§2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

United States v. Kuhn, 345 F.3d 431 (6th Cir. 2003). "The application notes to each enhancement [under §2Q1.3] authorize downward or upward departures based on several factors. For § 2Q1.3(b)(1)(B), applicable if the offense involved a discharge of a pollutant, application note 4 contemplates an upward or downward departure based on 'the harm resulting from the . . . discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation. . . .' For § 2Q1.3(b)(4), applicable if the offense involved a discharge without a permit or in violation of a permit, application note 7 contemplates an upward or downward departure based on 'the nature and quantity of the substance involved and the risk associated with the offense. . . ." *Kuhn*, 345 F.3d at 438 (citations omitted). "Section 2Q1.3(b)(1)(B) contemplates its application in the event of 'a discharge,' meaning a single discharge as does section 2Q1.3(b)(4)." *Id*. at 439. "Section 2Q1.3(b)(1)(B) and section 2Q1.3(b)(4) are two distinct offense level adjustments within an offense guideline and are intended to be applied cumulatively. The guidelines instruct that '[t]he offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used.'" *Id*. at 440 (citation omitted).

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

United States v. Cseplo, 42 F.3d 360 (6th Cir. 1994). In this opinion, the court of appeals explained why it was proper to aggregate the corporate tax loss and the individual tax loss in calculating the tax loss.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

United States v. DeSantis, 237 F.3d 607 (6th Cir. 2001). "[W]hether the § 2X1.1 reduction for mere attempts applies is controlled by whether 'the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense . . . ' as defined in the guidelines. . . . [T]he relevant substantive offense for purposes of evaluating § 2X1.1(b)(1) attempts is the fraud itself, not fraudulent deprivation of a particular sum." *DeSantis*, 237 F.3d at 612-13 (citations omitted).

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Curly, 167 F.3d 316 (6th Cir. 1999). "[An] adjustment [under §3A1.1] applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

In an effort to resolve the inconsistent application of section 3A1.1(b), the United States Sentencing Commission deleted the 'targeting' language from the commentary following section 3A1.1 on November 1, 1995. The revised commentary states that the vulnerable victim provision 'applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability.' Accordingly, most courts eliminated the 'targeting' element for sentencing enhancement purposes and simply require that the defendant knew of the victims' vulnerabilities. Because section 3A1.1 no longer requires proof of 'targeting' in light of the November 1, 1995 amendments to the sentencing guidelines, [the Sixth Circuit's] 1994 decision requiring proof of 'targeting' [(*United States v. Smith*, 39 F.3d 119, 122 (6th Cir.1994))] is no longer good law." *Curly*, 167 F.3d at 319 (citations omitted).

§3A1.2 Official Victim

United States v. Hudspeth, 208 F.3d 537 (6th Cir.), *cert. denied*, 531 U.S. 884 (2000). "[A]pplication of § 3A1.2(a) depends on the victim's status, not on whether he or she suffered harm. . . . [F]ederal criminal sentences may be enhanced pursuant to § 3A1.2(a) if the underlying conduct was motivated by the victim's status as a state or local government employee. . . ." *Hudspeth*, 208 F.3d at 540. "[T]he meaning of § 3A1.2(a) is clear and . . . the history of the provision affirms [the] conclusion that conduct motivated by the work of state and local employees, or by their status as employees, is covered by this guideline." *Id*. at 539.

§3A1.3 Restraint of Victim

United States v. Smith, 320 F.3d 647 (6th Cir.), *cert. denied*, 538 U.S. 1023 (2003). "Section [§3A1.3] . . . adjusts the base sentence upward by two levels where 'the victim was physically restrained in the course of the offense,' but also directs the court 'not [to] apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself.' Thus, in most circumstances

where the victim is abducted, the limiting provision of § 3A1.2 prevents the sentencing court from applying enhancements under both § 2B3.1(b)(4)(A) and § 3A1.2 since restraint often occurs as part of an abduction." *Smith*, 320 F.3d at 657 (citations omitted).

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Anthony, 280 F.3d 694 (6th Cir. 2002). In this opinion, the Sixth Circuit discussed how to apply §3B1.1 and explained why the enhancement was not warranted where the general manager of a manufacturer of cigarette lighters removed safety devices from disposable cigarette lighters. About the distinction between "participants" and "non-participants," the Sixth Circuit explained the following:

> Application Note 1 defines a participant as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." The guideline offers no further definition of "participant" or what it means to be "criminally responsible," but cases applying the guideline uniformly count as participants persons who were (i) aware of the criminal objective, and (ii) knowingly offered their assistance. On the other hand, "[a] person who is not criminally responsible for the commission of the offense . . . is not a participant."

Anthony, 280 F.3d at 698 (citations omitted). The Sixth Circuit provided the following guidance about the guideline's language "otherwise extensive":

> If the offense involved fewer than five participants, the "otherwise extensive" language of § 3B1.1(a) is an alternative ground on which the sentencing court may base its decision to depart upward. The two tests are equivalent, meaning that an upward departure is not appropriate under the "otherwise extensive" test unless the offense in question was somehow the functional equivalent of a crime involving five or more participants. The pivotal question . . . concerns what factors a sentencing court may consider in determining whether an activity was "otherwise extensive" under the guideline. . . .[T]he phrase authorizes a four-level enhancement when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants. . . . [I]n authorizing a departure for "extensive" criminal activity, what the Sentencing Commission had in mind was "numerosity." This is reflected in the Commission's plainly-stated intent to authorize an enhanced penalty based upon "the size of the criminal organization" in question. In fact, while the commentary makes repeated references to the "size" of the criminal organization and the "number" of participants involved, it makes no mention of the alternative factors . . . to find that the activity was extensive.

Id. at 699-700 (citations omitted). The Sixth Circuit also explained how courts must examine the contributions of knowing participants and non-participants to determine whether the combination

is the functional equivalent of an activity involving five criminally responsible participants. That discussion follows:

> Application Note 3 is the starting point of our analysis: "In assessing whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the services of many outsiders could be considered extensive." The difficult task is counting non-participants in a way that ensures an activity is not identified as "otherwise extensive" as a result of counting persons who were only tangentially involved in the offense. "The purpose of the provision would rarely be achieved by counting the unknowing services of some actors in a criminal scenario, a taxicab driver or bank teller, for instance." . . . the test for functional equivalence requires that a sentencing court consider how significant the role and performance of an unwitting participant was to the ultimate criminal objective.

Id. at 700-01 (citations omitted).

United States v. Gort-Didonato, 109 F.3d 318 (6th Cir. 1997). "Prior to November 1, 1993, an enhancement was warranted under § 3B1.1(c) where the defendant exercised a managerial, leadership, organizational or supervisory role in a criminal enterprise and four or less individuals were involved in the criminal enterprise; the defendant need not have exercised control over a specific member of the conspiracy." *Gort-Didonato*, 109 F.3d at 320. The commentary to the guideline was amended with an effective date of November 1, 1993. "That amendment, which is now articulated in Application Note 2 of the Commentary to § 3B1.1, provides:

> To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

Application Note 2 was added to clarify confusion amongst the circuit courts as to the operation of § 3B1.1." *Id.* at 321 (citations omitted).

"[U]nder the amended provision, the method by which the defendant's sentence is increased depends on whether the defendant exercised control over an individual or over tangible property, assets or activities of a criminal enterprise. Where the defendant exerts control over at least one participant in a supervisory, managerial, leadership, or organizational capacity, a sentence enhancement is required under § 3B1.1. Whereas, where a defendant does not exercise control over an individual but over property, assets, or activities, an upward departure may be warranted. Thus, as of November 1, 1993, a defendant must have exerted control over at least

one individual within a criminal organization for the enhancement of § 3B1.1 to be warranted." *Id.* at 321 (citations omitted).

United States v. Madden, 403 F.3d 347 (6th Cir. 2005). In this case, the Sixth Circuit determined that three mentally ill people who sold their votes were not vulnerable victims under §3A1.1(b)(1). The defendant was convicted for violating the federal vote-buying statute by paying the three individuals to vote for a candidate for local office in a primary election. In determining that the vote-sellers were not vulnerable for the purposes of §3A1.1(b)(1), the Sixth Circuit reasoned as follows:

> The [g]uidelines elsewhere acknowledge that for some crimes, including drug offenses, the victim is "society at large," rather than any individual. If a drug buyer—who chooses to harm himself through drug consumption—is not a "victim," then neither is someone who accepts payment for his vote. The vote-buying statute protects "society at large" from corruption of the electoral process; it does not protect, but rather restrains, individuals who value money more highly than their right to vote in a given election. Therefore, the vulnerable-victim enhancement was inappropriate here, because the alleged victims were not victims at all.

Madden, 403 F.3d at 349-50 (citations omitted).

§3B1.2 Mitigating Role

United States v. Campbell, 279 F.3d 392 (6th Cir. 2002). "For sentencing purposes, '[t]he salient issue is the role the defendant played in relation to the activity for which the court held him or her accountable." Defendants may be minimal or minor participants in relation to the scope of the conspiracy as a whole, but they are not entitled to a mitigating role reduction if they are held accountable only for the quantities of drugs attributable to them. In this case, the district court held [the defendant] accountable for at least 100, but less than 200 grams of cocaine, which was the 'amount of drugs that [the defendant] actually purchased and distributed or used.' The full amount of cocaine involved in the conspiracy was fifteen kilograms. Because the district court held [the defendant] accountable only for the quantity of drugs attributable to him, [the Sixth Circuit held] that the district court correctly denied [he defendant's] request for a downward adjustment pursuant to U.S.S.G. § 3B1.2. Moreover,[the Sixth Circuit has] held that downward departures under § 3B1.2 are available only to a party who is 'less culpable than most other participants' and 'substantially less culpable than the average participant.'" *Campbell*, 279 F.3d at 396 (citations omitted).

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Brogan, 238 F.3d 780 (6th Cir. 2001). "A position of trust under the guidelines is one 'characterized by professional or managerial discretion.' The guidelines continue by explaining that '[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily

non-discretionary in nature.' Although a number of cases on this issue look to how well the individual in fact was supervised, [the Sixth Circuit has] recently reaffirmed that 'the level of discretion accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position.' The 'position' must be one 'characterized by substantial discretionary judgment that is ordinarily given considerable deference.'

[T]he rationale for the sentencing enhancement is akin to punishment for violating a fiduciary duty, a higher duty than the ordinary one placed on all employees and breached by conversion. The trust relationship arises when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position, ceding to the other's presumed better judgment some control over their affairs. Indeed, the guideline examples of where the enhancement is appropriate correspond to the types of relationships where fiduciary duties are often implied: physician-patient, lawyer-client, officer-organization. By contrast, basic employment positions such as an 'ordinary bank teller' or 'hotel clerk' are mentioned as inappropriate. In general the formation of these sorts of confidential interdependent relationships is socially beneficial. Such relationships require, however, 'faith in one's fellow man,' which is generally undermined when an instance of abuse occurs. . . . [A]n important purpose of § 3B1.3 is the defense of private ordering based on trust (or presumably in cases where 'public trust' is violated, the necessary faith citizens must have in government for a well functioning republic); this separate wrong merits additional punishment.

Another purpose of § 3B1.3, which . . . must now be considered secondary, is the provision of additional deterrence for crimes that are 'difficult to detect' due to the defendant's position. This would potentially serve to raise the expected cost to those tempted by an ability to conceal their transgressions. However, . . . it is the 'inherent nature of the work' involved, in which substantial non-ministerial agency has been bestowed, that should control the inquiry. Thus, [there's a difference in] employees who administer another's property [and] . . . those authorized only to handle it but who are lightly supervised. Although both types of employees have the ability to commit crimes difficult for the victim to detect, it is the former type that normally warrants the abuse of trust enhancement." *Brogan*, 238 F.3d at 783-84 (citations omitted). In this case, the Sixth Circuit determined that the defendant—the assistant treasurer of a corporation who used a fraudulent wire transfer to misappropriate $7.9 million—did not qualify for the enhancement. The district court enhanced the defendant's sentence based on three factors—(1) the job description of the defendant's position found in the presentence report; (2) the willingness of his superior to believe his explanation of the wire transfer; and (3) the sheer size of the theft—but the Sixth Circuit determined that the defendant did not have a position of trust. The Sixth Circuit explained that even though the defendant's position significantly aided him in committing and concealing his offense, his position was inherently clerical. The Sixth Circuit opined that the district court placed too little emphasis on the authority and discretion that the defendant's job actually entailed when it inquired if he had violated the heightened duty of trust implicated by § 3B1.3.

United States v. Gilliam, 315 F.3d 614 (6th Cir. 2003), *cert. denied*, 540 U.S. 1155 (2004). "A 'position of trust' under the [g]uidelines is one 'characterized by professional or managerial discretion.' Moreover, '[p]ersons holding such positions ordinarily are subject to

significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature.' '[T]he level of discretion accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position.'" *Gilliam*, 315 F.3d at 617 (citations omitted). In this case, the defendant maintained that he did not abuse the public trust because he was employed by a government contractor rather than the government. The court of appeals rejected this distinction, observing that the defendant worked as a drug counselor for an employer that was under contract with the United States Probation Office to provide counseling services to individuals placed on probation. In this capacity, the court explained, the defendant occupied a position which implied that he served an essentially public function involving considerable responsibility with respect to both the government and society at large. The court stated that a "position of trust" arises almost as if by implication "'when a person or organization intentionally makes himself or itself vulnerable to someone in a particular position, ceding to the other's presumed better judgment some control over their affairs.'" *Id.* at 618 (internal citations omitted). As a probation counselor under contract with the United States Probation Office, the court of appeals concluded, the defendant was employed in a position of considerable trust, a position he abused by attempting to engage in illicit drug transactions with a client. Accordingly, the court of appeals found the enhancement was properly applied.

United States v. Godman, 223 F.3d 320 (6th Cir. 2000). "[Section] 3B1.3 provides in pertinent part that 'If the defendant . . . used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase [the Base Offense Level] by 2 levels.' Application Note 3 in the Commentary provides that "'Special skill' refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.'" *Godman*, 223 F.3d at 322 (citations omitted). In this case, the defendant who pleaded guilty of counterfeiting Federal Reserve notes challenged the application of the enhancement based on his computer skills. The defendant had no formal computer training and only used an off-the-shelf software program which he learned in less than a week. The Sixth Circuit determined that the defendant's computer skills could not reasonably be equated to the skills possessed by the professionals listed in Application Note 3. The Sixth Circuit's explanation about why the defendant's computer skills were not special for the purpose of §3B1.3 follows:

> Such [special] skills are acquired through months (or years) of training, or the equivalent in self-tutelage. Computer skills on the order of those possessed by [the defendant], by contrast, can be duplicated by members of the general public with a minimum of difficulty. Most persons of average ability could purchase desktop publishing software from their local retailer, experiment with it for a short period of time, and follow the chain of simple steps that [the defendant] used to churn out counterfeit currency. [The defendant's] computer skills thus are not "particularly sophisticated" . . . .
>
> At a time when basic computer abilities are so pervasive throughout society, applying § 3B1.3 to an amateurish effort such as [the defendant's] would threaten

> to enhance sentences for many crimes involving quite common and ordinary computer skills. The Guidelines contemplate a more discriminating approach.

Id. at 323.

United States v. Humphrey, 279 F.3d 372 (6th Cir. 2002). "The . . . [g]uidelines commentary describes a position of trust as one 'characterized by professional or managerial discretion (*i.e*., substantial discretionary judgment that is ordinarily given considerable deference).' The application note specifies that the adjustment would apply to 'a bank executive's fraudulent loan scheme' but not 'embezzlement or theft by an ordinary bank teller.' [T]he level of discretion rather than the amount of supervision is the definitive factor in determining whether a defendant held and abused a position of trust. This discretion should be substantial and encompass fiduciary-like responsibilities." *Humphrey*, 279 F.3d at 379-80 (citations omitted). In this appeal, the defendant—a vault teller who embezzled bank funds and made false entries in bank records with the intent to defraud—challenged the application of the enhancement. The defendant argued that the adjustment should not apply to the position of vault teller. In addressing the question as a matter of first impression, the Sixth Circuit stated that a vault teller fell somewhere in the middle of the spectrum between a bank teller and a bank executive. The Sixth Circuit observed that the defendant's level of discretion was greater than that of a regular teller but considerably less than that of a bank president. The Sixth Circuit explained that although the defendant appeared to have been under light or no supervision, she was not authorized to exercise substantial professional or managerial discretion in her position. The defendant did, however, take advantage of her seniority to other bank employees to control the daily cash count and to handle food stamps, but she was not in a trust relationship with the bank such that she could administer its property or otherwise act in its best interest. The Sixth Circuit determined that the defendant abused her clerical position and the bank's apparent trust in her to embezzle cash from the bank, but concluded that she did not hold a position of trust. Consequently, the enhancement did not apply.

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Brown, 237 F.3d 625 (6th Cir.), *cert. denied*, 532 U.S. 1030 (2001). "The obstruction adjustment does not . . . apply unless [the defendant] acted 'willfully.' It has been said that the term 'willful' has 'no fixed meaning.' However, the term generally connotes some kind of deliberate or intentional conduct." *Brown*, 237 F.3d at 628 (citations omitted). Here, the defendant was convicted of producing and possessing child pornography. Prior to the defendant's arrest, he hreatened to stab a child whom he had repeatedly molested. On appeal, the defendant argued that the threats to the child did not warrant application of the enhancement under §3C1.1 because at the time he made the threats, the investigation had not focused on him so he could not have been *willfully* obstructing the investigation until after his arrest. The Sixth Circuit disagreed and joined the Fifth and Eighth Circuits in holding that "the obstruction adjustment applies where a defendant engages in obstructive conduct with knowledge that he or she is the subject of an investigation or with the 'correct belief' that an investigation is 'probably

underway.'" *Id*. (citations omitted). The Sixth Circuit found that the defendant's chat room comment, "God, I hope he don't have any of my privates on there," was sufficient evidence to make it clear that he knew prior to his arrest that he was under investigation and concluded that application of the level enhancement under §3C1.1 was proper.

United States v. Dejohn, 368 F.3d 533 (6th Cir.), *cert. denied*, 543 U.S. 988 (2004). In this case, the defendant argued that "his perjury was insufficiently material to support an obstruction-of-justice enhancement," but the Sixth Circuit explained that "it is hard to imagine a perjurious statement more material to a conviction for conspiracy to distribute drugs than one claiming never to have distributed drugs." *DeJohn*, 368 F.3d at 547.

United States v. Hover, 293 F.3d 930 (6th Cir. 2002). In this appeal, the Sixth Circuit determined that the defendant's perjured testimony in a prior trial which ended in mistrial could be considered obstruction of justice in sentencing him after the second prosecution for same charges.

United States v. Lawrence, 308 F.3d 623 (6th Cir. 2002). "For a district court to enhance a defendant's sentence under § 3C1.1, the court must: 1) identify those particular portions of defendant's testimony that it considers to be perjurious; and 2) either make a specific finding for each element of perjury or, at least, make a finding that encompasses all of the factual predicates for a finding of perjury. . . . [T]he second requirement was held by the Supreme Court to be necessary under § 3C1.1. The first of these requirements, however, is a rule of our own creation to assist us in our review of sentence enhancements under § 3C1.1, though we have never insisted on a rigid adherence to its terms. Thus, a district court's findings will be adequate if: 1) the record is sufficiently clear to indicate which statements the district court considered perjurious; and 2) the district court found that the statements satisfied each element of perjury." *Lawrence*, 308 F.3d at 632 (citations omitted).

United States v. Mise, 240 F.3d 527 (6th Cir. 2001). "An adjustment for obstruction of justice applies to a defendant 'committing, suborning or attempting to suborn perjury.' A witness perjures himself if he 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.' [To apply the enhancment], the district court . . . [must] fulfill two requirements: 'first, it must identify those particular portions of the defendant's testimony that it considers to be perjurious, and second, it must either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury.'" *Mise*, 240 F.3d at 531 (citations omitted).

United States v. Perry, 30 F.3d 708 (6th Cir. 1994). Here, the Sixth Circuit determined that an enhancement under §3C1.1 constituted double-counting where the district court based the enhancement on the defendant's failure to appear clean-shaven for trial as directed by the district court. The Sixth Circuit stated that the defendant's contemptuous conduct could not serve as the basis for both an obstruction of justice enhancement and a contempt sentence. Having already sentenced the defendant for contempt, the Sixth Circuit explained, "it was not appropriate for the

court to enhance the sentence for the underlying offense based on the same conduct involved in the contempt." *Perry*, 30 F.3d at 712.

§3C1.2 Reckless Endangerment during Flight

United States v. Hazelwood, 398 F.3d 792 (6th Cir. 2005). Section 3C1.2 provides for a two-point enhancement for "reckless endangerment during flight." The Sixth Circuit determined the enhancement applied to a high-speed case that followed a bank robbery. The evidence before the district judge included a video tape of a law enforcement officer who pursued the defendant. The officer on the videotape stated that the defendant was traveling in excess of 90 miles an hour. Based on the video tape, the district judge "found that the road was wet, that [the defendant] crossed the double yellow line several times while traveling at high speed, that there were numerous other vehicles on the road, and, most importantly, that at least one other car was forced to leave the pavement as [the defendant] abruptly turned right with his left blinker flashing." *Hazelwood*, 398 F.#d at 796. The court of appeals stated that the district judge's findings supported a finding of reckless endangerment.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Green, 305 F.3d 422 (6th Cir. 2002). Here, the Sixth Circuit sided with the other circuits that have determined that "grouping the failure to appear offense with the underlying offense for sentencing is appropriate based on the guidelines and the commentary." *Green*, 305 F.3d at 436. *See United States v. Gigley*, 213 F.3d 503 (10th Cir. 2000); *United States v. Kirkham*, 195 F.3d 126, 130-32 (2d Cir. 1999); *United States v. Jernigan*, 60 F.3d 562, 564 (9th Cir. 1995); *United States v. Pardo*, 25 F.3d 1187, 1193-94 (3d Cir. 1994); *United States v. Lechuga*, 975 F.2d 397, 401 (7th Cir. 1992); *United States v. Magluta*, 203 F.3d 1304, 1305 (11th Cir. 2000).

§3D1.4 Determining the Combined Offense Level

United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996). In this opinion, the Sixth Circuit determined that seven units are not "significantly more than 5" for the purposes of the commentary to §3D1.4. In reaching this conclusion, the Sixth Circuit explained the following:

> The [g]uidelines established an elaborate system to weigh all, or virtually all, of the facets of an offender's criminal activities. The base offense level assigned to a particular offense generally accounts for the seriousness of the offense, while the sections for specific offense characteristics and the various sections on adjustments for offender and victim characteristics account for these other variables. Section 3D1.4, on the other hand, is meant to account solely for the number of different offenses or groups of offenses that an offender committed. Departure from the chart in this section should thus be based solely on the number of units assigned to an offender, not the underlying nature of the units.

> To approach this chart otherwise and interpret its concept of "significantly more than five" to involve some subjective weighing of the social significance of the underlying offenses usurps the role assigned to the Sentencing Commission in setting base offense levels, and turns the section into a catch-all provision justifying departure whenever a court simply believes an offender with more than five units deserves additional punishment. The whole point of the [g]uidelines is to reduce or remove this type of discretion from the sentencing process and assign certain numerical values to certain facets of an offender's criminal activities. To confound the facet of the [g]uidelines dealing with the magnitude of criminal activity with other facets of the [g]uidelines, such as the subjective social harm caused by the particular type of offenses involved, reduces the precision and uniformity of sentences.

Valentine, 100 F.3d at 1213.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Angel, 355 F.3d 462 (6th Cir.), *cert. denied*, 543 U.S. 867 (2004). The Sixth Circuit discussed several decisions in this opinion that illustrate circumstances where an acceptance-of-responsibility reduction is inappropriate. The Sixth Circuit then applied those decisions to the instant case and determined that the defendant was not entitled to a reduction for acceptance of responsibility. The Sixth Circuit explained that the defendant obstructed justice and made no effort to repudiate the obstruction, and that he would not admit that he offered a third party $50,000 to kill the government witness even though the district court found that this event occurred. The Sixth Circuit stated that attempting to have a witness killed is far more serious than the conduct considered in prior appeals—*i.e.*, ignoring government orders, lying about a legal name and criminal history, and making false statements to the grand jury. The Sixth Circuit observed that the defendant's obstructive conduct occurred after he was indicted and that the defendant never tried to undo that conduct. In addition, he provided no assistance to the authorities and proceeded to trial to challenge the essential factual elements of guilt. The Sixth Circuit characterized the defendant as "precisely the type of defendant mentioned in the notes to § 3E1.1 'who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.'" *Angel*, 355 F.3d at 478 (citations omitted).

United States v. Brown, 367 F.3d 549 (6th Cir. 2004). "[P]utting the government to its burden [does] not automatically preclude a reduction under § 3E1.1." *Brown*, 367 F.3d at 556-57.

United States v. Castillo-Garcia, 205 F.3d 887 (6th Cir. 2000). "Application Note 3 to the [g]uidelines instructs that while '[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction . . . will constitute significant evidence of acceptance of responsibility,' this evidence may

nonetheless 'be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.' Thus, merely pleading guilty does not entitle a defendant to an adjustment 'as a matter of right.'" *Castillo-Garcia*, 205 F.3d at 888-89 (citations omitted).

United States v. Forrest, 402 F.3d 678 (6th Cir. 2005). "The Sentencing Commission has explained that § 3E1.1 'is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.' The application note containing this statement goes on to say that '[c]onviction by trial, however, does not automatically preclude a defendant from consideration' for a § 3E1.1 reduction: 'In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt . . . In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.'" *Forrest*, 402 F.3d at 688 (citations omitted). In this case, the court of appeals determined that the defendant's situation was not one of the rare situations contemplated by the commentary to § 3E1.1 where the defendant clearly demonstrated an acceptance of responsibility though pre-trial statements and conduct even though he proceeded to trial. The defendant vigorously disputed his factual guilt at trial, arguing through his lawyer that the government's witness lied about the defendant's participation in the robbery, about simply being in the wrong place at the wrong time, and about ownership of money found on his person.

United States v. Jeter, 191 F.3d 637 (6th Cir. 1999). The district court did not err by refusing to find that the defendant accepted responsibility when the defendant committed pre-indictment misconduct. The defendant pleaded guilty and cooperated with the government, but following his June 1996 state charge arrest for loan fraud conduct (and prior to his November 1997 federal indictment), the defendant engaged in additional fraudulent conduct; accordingly, the district court could properly find the defendant did not qualify for the reduction.

United States v. Roper, 135 F.3d 430 (6th Cir.), *cert. denied*, 524 U.S. 920 (1998). The district court did not err in denying the defendant an acceptance of responsibility reduction when the defendant fabricated an entrapment defense.

United States v. Smith, 245 F.3d 538 (6th Cir. 2001). "Pursuant to the sentencing guidelines, a defendant may decrease his offense level by two levels if he 'clearly demonstrates acceptance of responsibility for his offense.'" *Smith*, 245 F.3d at 547 (citation omitted). The defendant in this appeal argued that the district court erred in not granting him the additional one level for acceptance of responsibility under §3E1.1(b). The court determined that the defendant's delay until the eve of the trial to enter a guilty plea compelled the government to prepare its entire case for trial. Consequently, the court upheld the two-level reduction for acceptance of responsibility and affirmed the defendant's sentence.

United States v. Surratt, 87 F.3d 814 (6th Cir. 1996). "The defendant bears the burden of showing by a preponderance of the evidence that the reduction is justified. A defendant who pleads guilty is not entitled to a reduction as a matter of right. However, the '[e]ntry of a plea of

guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) ···, will constitute significant evidence of acceptance of responsibility. . . .'" *Surratt*, 87 F.3d at 821 (citations omitted). In this appeal, the appellate court reversed the district court's decision awarding the defendant a two-level reduction for acceptance of responsibility under §3E1.1. The appellate court noted that whether the defendant has accepted responsibility for purposes of the guideline reduction is a factual determination which is accorded great deference, subject to reversal on appeal only if the decision was clearly erroneous. However, upon review of the entire record, the appellate court determined that the defendant had not carried his burden of showing by a preponderance of the evidence that he merited the reduction. The presentence report stated that the defendant persistently attempted to deny and minimize his criminal conduct. It specifically noted that the defendant blamed his abuse of his wife and daughter and his act of ordering child pornography on drug abuse. The appellate court explained that the district court "did not refer to the 'appropriate considerations' for such a determination listed in application note 1 to §3E1.1." *Id.* at 822.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Carter, 283 F.3d 755 (6th Cir.), *cert. denied*, 537 U.S. 874 (2002). "[C]rimes [are] part of the same scheme or plan only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another. . . . [T]he commission of a crime spree does not render such offenses related. If the offenses were not jointly planned in the inception, or if the commission of one offense entailed the commission of another, under § 4A1.2(a)(2), the offenses are unrelated . . . and should be counted separately." *Carter*, 283 F.3d at 758 (citations omitted). In this case, the defendant maintained that his three prior state court drug convictions should have been treated as one offense for the purpose of calculating criminal history points under §4A1.2, but the court of appeals found no evidence the defendant jointly planned all three drug sales or that the commission of the first drug transaction entailed the commission of the following drug sales. As a result, the court of appeals upheld the application of the enhancement.

United States v. Galvan, Nos. 04-1741 & 05-1188, 2006 WL 1912739 (6th Cir. July 13, 2006). "To calculate criminal history points '[i]n the case of a prior revocation of probation,' a court must 'add the original term of imprisonment to any term of imprisonment imposed upon revocation.'" *Galvan*, Nos. 04-1741 & 05-1188, 2006 WL 1912739, at *1 (citation omitted). Section "'4A1 .2(k)(1) contemplates that, in calculating a defendant's total sentence of imprisonment for a particular offense, the district court will aggregate any term of imprisonment imposed because of a probation violation with the defendant's original sentence of imprisonment, if any.'" *Id.* at *2 (citation omitted).

United States v. Irons, 196 F.3d 634 (6th Cir. 1999). "In deciding whether prior offenses are part of a 'single common scheme or plan,' as would render them 'related' under U.S.S.G. § 4A1.2(a)(2) for assigning criminal history points and for treating separate convictions as a single crime, we find that 'scheme' and 'plan' are words of intention, implying that [offenses] have been jointly planned, or at least that . . . the commission of one would entail the commission of the other as well.'" *Irons*, 196 F.3d at 638 (citation omitted). "[A] defendant has the burden of establishing that his crimes were jointly planned or that the commission of one entailed the other." *Id*. at 639. In this case, the defendant argued that two prior offenses—violation of a protection order and breaking and entering a former girlfriend's home—were related because the offenses were part of a crime spree intended to harass the former girlfriend. The Sixth Circuit stated that "prior convictions are not 'related' merely because they are part of a crime spree." *Id*. at 638. The Sixth Circuit explained that "[a]lthough [the] defendant's purpose to harass his former girlfriend may have been similar, ...crimes are not 'related' merely because each was committed with the same purpose or common goal." *Id*. at 639. The Sixth Circuit further explained that in order to show that two offenses are related, the defendant must show that "he either intended from the outset to commit both crimes or that he intended to commit one crime which, by necessity, involved the commission of a second crime." *Id*. The defendant presented no evidence that at the time he violated the protection order, that he decided to break into his former girlfriend's's house, so the offenses were not related.

United States v. Martin, 438 F.3d 621 (6th Cir. 2006). "[A] defendant seeking to show that offenses are related must prove that the crimes were jointly planned or that commission of one crime entailed committing the other crime or crimes." *Martin*, 438 F.3d at 638. "[C]rimes are related 'only if the offenses were jointly planned, or, at a minimum, the commission of one offense necessarily required the commission of another.'" *Id*. (citation omitted). "Moreover, 'prior convictions are not 'related' merely because they are part of a crime spree'." *Id*. (citation omitted). In this case, the defendant maintained that his four prior convictions for car theft were related. The Sixth Circuit observed that the car thefts took place in two different states on four separate occasions and that the defendant had presented no evidence that show that showed the offenses were related. The Sixth Circuit stated that the "'the simple sharing of a modus operandi cannot alone convert [separate offenses] into one offense by virtue of their being a single common scheme or plan.' To the contrary, similar substantive crimes committed on different dates involving different victims are not considered related even if each 'was committed with the same purpose or common goal,' usually that of acquiring money. *Id*. (citations omitted). Although the defendant "used the same tactics in stealing all four automobiles, the victim in each crime was different, and the commission of one theft did not necessarily entail committing the other thefts." *Id*. As a result, the car thefts were not related.

§4A1.3 Departures Based on Inadequacy of Criminal History Category (Policy Statement)

United States v. Barber, 200 F.3d 908 (6th Cir. 2000). "Given . . . § 4A1.3, it is clear that the [s]entencing [g]uidelines do not prohibit departures based upon a finding that the criminal history computation is simply not representative of a defendant's past criminal behavior nor indicative of future unlawful conduct. . . . [A] departure upon this basis is expressly encouraged by the [s]entencing [g]uidelines." *Barber*, 200 F.3d at 912. "Further, . . . § 4A1.3 authorizes the Court to consider, in addition to prior conviction, in the computation of criminal history, 'prior sentence(s) not used in computing the criminal history category.'" *Id*. at 912-13. In this opinion, the court of appeals determined that the district court did not abuse its discretion in departing upward from Criminal History Category IV to Criminal History Category VI. There was ample support in the record to justify the district court's conclusion that, pursuant to §4A1.3, the defendant's criminal past and likelihood of recidivism were not adequately represented by his otherwise applicable guideline range:

> At the time of sentencing, the defendant was 26 years old. Prior to sentencing, he had been sentenced to life imprisonment in Alabama and was released on February 14, 1994 on lifetime parole. Only a few months later, on May 17, 1994, he was charged with driving with a suspended license, fleeing a police officer and having alcohol in a motor vehicle. Two years later, he was convicted of carrying a concealed weapon and resisting and obstructing a police officer. One month later, the defendant was convicted of three counts of breaking and entering with intent to commit larceny.

Id. (footnote omitted).

United States v. Mayle, 334 F.3d 552 (6th Cir. 2003). "[S]entencing courts must 'move stepwise up the ladder' of criminal history categories, and 'make specific findings, articulated in language relating to the guidelines, concerning the inadequacy of any sentencing categories passed over.' [W]hen a sentencing court concludes that departure is proper, it must provide a 'specific reason' supporting its decision to depart. This burden is satisfied by a short, reasoned statement from the bench identifying the aggravating factors and the court's reasons for connecting them to permissible grounds for departure." *Mayle*, 334 F.3d at 566-67 (citations omitted).

"[A] sentencing court is not prohibited from considering uncharged criminal conduct. Congress has provided that '[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.' [The statute that defines the information can be used for sentencing] 'was enacted in order to clearly authorize the trial judge to rely upon information of alleged criminal activity for which the defendant had not been prosecuted.'" *Id.* at 565-66 (citations omitted). In this case, the defendant complained that the district court should not have considered evidence of his responsibility for two previous deaths that were unrelated to his offenses of conviction (fraud, forgery, and false statement) because that evidence did not fall under any of five examples listed

in the guidelines. The Sixth Circuit explained that the examples were illustrative and not exhaustive of the information that a district court can consider in determining the adequacy of the defendant's criminal history category. The Sixth Circuit explained that although the defendant's responsibility for the prior deaths was not similar to the offenses of conviction, the deaths were similar to the relevant conduct associated with a death related to the offenses of conviction, *i.e*., causing the death of a third individual. The defendant caused all three deaths for the purpose of promoting his own financial gain and the defendant had made a career out of living off vulnerable victims. The Sixth Circuit stated that §4A1.3 is "broad enough to permit consideration of adult criminal conduct that is similar to the relevant conduct surrounding the offense of conviction, even if it is not similar to the offense of conviction itself." *Id*. at 566. The Sixth Circuit explained that information that the defendant caused the deaths of two individuals to promote his own financial gain was relevant to his past criminal conduct and to the likelihood that he would commit other crimes. Consequently, increasing the defendant's criminal history score was appropriate.

United States v. Schultz, 14 F.3d 1093 (6th Cir. 1994). "A court departing upward from a defendant's calculated Criminal History Category must satisfy two requirements:

> (1) The court must 'articulate its reasons for departing from the guidelines in language relating to the guidelines.'
> (2) Where the court 'depart[s] beyond the next higher criminal category' it must demonstrate 'either that it first looked to the next higher criminal history category for guidance or that it found the sentence under the next higher criminal history category too lenient.'"

Schultz, 14 F.3d at 1101 (citations omitted). In this case, the Sixth Circuit vacated the defendant's sentence because the district court failed to explain why the defendant's criminal history category was inadequate or why the next higher category was appropriate. The Sixth Circuit remanded the case for resentencing. The Sixth Circuit explained that "in any upward departure, the [district] court must move stepwise up the ladder of criminal history categories and must make specific findings, articulated in language relating to the guidelines, concerning the inadequacy of any sentencing categories passed over." *Id*.

United States v. Thomas, 24 F.3d 829 (6th Cir.), *cert. denied*, 513 U.S. 976 (1994). "When a sentencing court concludes that departure is proper, it must provide a 'specific reason' supporting its decision to depart, which is satisfied by a short, written or reasoned statement from the bench identifying the aggravating factors and the court's reasons for connecting them to permissible grounds for departure. The court's statement must be more than conclusory; it must identify the specific reasons why the guideline range is inadequate and underrepresents the defendant's criminal history." *Thomas*, 24 F.3d at 833-34 (citations omitted).

"Ordinarily when departing from the [g]uidelines because a particular criminal history category is inadequate, the court must look to the next higher criminal history category, and must use that range as a reference before otherwise departing from the [g]uidelines." *Id*. at 834. In this case, the district court determined that criminal history category VI was inadequate and thus

there was no next higher criminal history category for the sentencing court to use as a reference. The Sixth circuit explained that the district court's upward departure could be upheld if the district court provided "a short clear statement from the bench explaining (1) what aggravating circumstances existed which were not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines; and (2) why the [a sentence in the range of the next higher offense level] is the appropriate sentence given the facts of this case." *Id.*

The Sixth Circuit stated that the district court does not have to provide a mechanistic recitation of its rejection of the intervening, lower guideline ranges, but instead must structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case. This means that the district court must move down offense-level ranges only until it finds a range which would provide an appropriate sentence for the defendant, but no further. The district court does not have to move only one level, or to explain its rejection of each and every intervening level. Rather the district court must continue to consider ranges until it finds an appropriate sentence.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Champion, 248 F.3d 502 (6th Cir. 2001). The defendant argued that his violation of 18 U.S.C. § 2251(a) for enticing a minor to engage in sexually explicit conduct for the purpose of a visual depiction was not a crime of violence because it did not have as an element, the use, attempted use, or threatened use of physical force against the person of another. The court found that Congress itself had "undertaken the fact-finding necessary to conclude that a violation of section 2251(a), by its very nature, presents a serious potential risk of physical injury" and held that the district court properly concluded that the defendant's section 2251(a) conviction was a crime of violence.

United States v. Horn, 355 F.3d 610 (6th Cir.) *cert. denied*, 541 U.S. 1082 (2004). "[C]rimes are part of the same scheme or plan only if the offenses are jointly planned, or, at a minimum, the commission of one offense necessarily requires the commission of the other. . . . '[T]he simple sharing of a modus operandi cannot alone convert [separate offenses] into one offense by virtue of their being a single common scheme or plan.' . . . [M]erely because crimes are part of a crime spree does not mean that they are related. Nor are such offenses related because they were committed to achieve a similar objective, such as the support of a drug habit. Finally, offenses are not necessarily related merely because they were committed within a short period of time." *Horn*, 355 F.3d at 614-15 (citations omitted). In this case, the Sixth Circuit determined that the district court properly determined that two robberies were not part of a common scheme or plan. The Sixth Circuit explained that the robberies were committed weeks apart at different locations; the offenses involved different victims; and the defendant had an accomplice in the first offense but not the second. The Sixth Circuit stated that no evidence indicated that the two armed robberies were jointly planned or that the commission of the first robbery entailed the commission of the second.

United States v. Montanez, 442 F.3d 485 (6th Cir. 2006). In this opinion, the Sixth Circuit determined that the defendant's two drug-related convictions under former Ohio Revised Code § 2925.03(A)(6) and (9) did not constitute predicate offenses for career offender status. To make this determination, the Sixth Circuit used the categorical approach and examined the statutory language for the two convictions at issue—Ohio Revised Code § 2925.03(A)(6) and Ohio Revised Code § 2925.03(A)(9). The Sixth Circuit determined that the plain language of the statutes indicated that each offense contained only the element of "possession" and did not contain the element of "intent to distribute." Because neither offense contained an element of intent to distribute that would allow the defendant's sentence to be enhanced under § 4B1.1, the Sixth Circuit determined that an enhancement was inappropriate.

United States v. Walker, 181 F.3d 774 (6th Cir.), *cert. denied*, 528 U.S. 980 (1999). The district court did not err in finding that the defendant's prior state court conviction for solicitation to commit aggravated robbery was a "crime of violence" and, therefore, the defendant was properly sentenced as a career offender.

United States v. Wilson, 168 F.3d 916 (6th Cir. 1999). The court of appeals held that the burglary of a building which is not a dwelling is not a crime of violence as defined in §4B1.2(a)(2), but that under certain circumstances maybe a crime of violence under the subsection's "otherwise" language. On remand, the court could consider the burglary charge to decide whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another."

United States v. Wood, 209 F.3d 847 (6th Cir.), *cert. denied*, 530 U.S. 1283 (2000). In this case, the court of appeals held that Alabama's offense of robbery in the third degree was a "crime of violence" because robbery was an enumerated offense and because the statutory definition for the offense has as an element the use, attempted use, or threatened use of physical force against the person of another.

§4B1.4 Armed Career Criminal

United States v. Hargrove, 416 F.3d 486 (6th Cir. 2005). In this opinion, the Sixth Circuit determined that the defendant's prior felony convictions—three Ohio sexual battery convictions under Ohio Rev. Code § 2907.03(A)(5) (1994)—were not violent felonies under the Armed Career Criminal Act. To reach this determination, the Sixth Circuit used the exception to the rule from Taylor v. United States that permits the district court to look only to the fact of conviction and the statutory definition of the prior offense. The exception applies to cases where "the prior offense is defined broadly enough for it to encompass some offenses that meet the ACCA's definition of a 'violent felony' and some that do not. . . ." *Hargrove*, 416 F.3d at 494. In that case, the district court may also consider the charging document and jury instructions.

In applying the exception to the defendant's prior conviction, the Sixth Circuit observed that the state indictment alleged no facts other than that the defendant engaged in sexual conduct with two of his step-daughters and consequently violated § 2907.03(A)(5). The Sixth observed that the offense defined in that section was not inherently coercive. The Sixth Circuit explained

that "statute does not require the state to prove lack of consent, nor does it permit the defendant to affirmatively prove consent" or "require the state to prove the victim was a minor child or, if not a minor, subject in some sense to the parent-defendant's control." Id. at 496. The Sixth Circuit states that the statute "merely require[d] the state to show (1) the defendant was the victim's natural, adopted, or stepparent, and (2) the two engaged in sexual conduct." Id. The Sixth Circuit concluded that "the conduct proscribed by the statute, and charged in the indictment, [did] not present a serious potential risk of physical injury to another." Consequently, the defendant's prior offenses were not violent for the purposes of the ACCA.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Adu, 82 F.3d 119 (6th Cir. 1996). "When seeking a downward adjustment of a sentence otherwise required by the guidelines, a defendant has the burden of proving by a preponderance of the evidence his or her entitlement to a reduction. Thus, the party seeking a departure, either upward or downward from a presumptive guidelines sentence has the burden of proving entitlement to the departure." *Adu*, 82 F.3d at 123-24. In this case, the court of appeals determined that the defendant did not meet his burden of proving that he provided the government with all information and evidence he had concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The court of appeals explained that the defendant's statement that he gave the government "all they asked" did not satisfy his burden of proof. The court of appeals stated that 18 U.S.C. § 3553(f)(5) and §5C1.2(5) require an affirmative act by the defendant to truthfully disclose all the information he possesses concerning his offense or related offenses.

United States v. Bazel, 80 F.3d 1140 (6th Cir.), *cert. denied*, 519 U.S. 882 (1996). "Section 3553(f) [of title 18] and § 5C1.2 . . . require the [sentencing] court to make a finding both that the defendant was not an "organizer, leader, manager, or supervisor" and that the defendant was not engaged in a [continuing criminal enterprise] in order to open the 'safety valve.'" *Bazel*, 80 F.3d at 1142. In this appeal, the defendant maintained that he was eligible for the safety valve because he was not engaged in a continuing criminal enterprise although the government demonstrated that he was an "organizer, leader, manager, or supervisor" of a criminal operation. The court of appeals explained that once the district court found that the defendant was an "organizer, leader, manager, or supervisor," it could not make one of the findings necessary to opening the "safety valve." Thus, the court of appeals stated that the district court properly denied the safety valve.

United States v. Bolka, 355 F.3d 909 (6th Cir. 2004). "The application of a § 2D1.1(b)(1) sentence enhancement does not necessarily preclude the application of a § 5C1.2(a) 'safety valve' reduction. A defendant may be unable to prove that it is clearly probable that the firearm was not connected to the offense—the logical equivalent of showing that it is clearly improbable

that the firearm was connected to the offense—so as to defeat a § 2D1.1(b)(1) enhancement. However, that same defendant may, nevertheless, be able to prove by a preponderance of the evidence that the firearm was not connected to the offense so as to satisfy § 5C1.2(a)(2). The 'clearly improbable' standard is a higher quantum of proof than that of the 'preponderance of the evidence' standard. It does not deductively follow from a defendant's failure to satisfy a higher quantum of proof on a particular issue that he cannot satisfy a lower quantum of proof on that same issue. It also does not necessarily follow from the existence of a preponderance of evidence demonstrating that a defendant possessed a firearm during the time of the offense—the government's prima facie burden of proof for purposes of a § 2D1.1(b)(1) enhancement that there exists a preponderance of evidence demonstrating such possession in connection with the offense-contrary to the defendant's burden of proof so as to defeat a § 5C1.2(a) reduction. While they are quantitatively the same, these evidentiary standards are qualitatively distinct. Similarly, it does not deductively follow from the presumption that a defendant's possession of a firearm was connected to the offense—arising from a preponderance of evidence demonstrating such possession during the time of the offense—for purposes of a § 2D1.1(b)(1) enhancement that a preponderance of evidence demonstrating such a connection, in fact, exists for purposes of a § 5C1.2(a) reduction. Consequently, a defendant's conduct warranting a § 2D1.1(b)(1) enhancement does not per se preclude that defendant from proving by a preponderance of the evidence that his possession of the firearm was not connected with his offense for purposes of a § 5C1.2 (a) 'safety valve' reduction." *Bolka*, 355 F.3d at 914 (citations omitted).

United States v. Maduka, 104 F.3d 891 (6th Cir. 1997). In this opinion, the Sixth Circuit indicated that sentencing under the safety-valve provision requires a defendant convicted of distribution to provide complete and accurate information regarding the participation of other people in a drug offense.

United States v. Penn, 282 F.3d 879 (6th Cir. 2002). "The 'safety valve' provision of 18 U.S.C. § 3553(f) provides that in cases involving certain drug offenses, including violations of 21 U.S.C. § 841, the sentencing court may impose a sentence 'without regard to any statutory minimum sentence,' if the court determines that the five criteria listed in § 3553(f) are satisfied. The first criterion requires that 'the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.' Section 5C1.2 of the Sentencing Guidelines interprets the 'safety valve' exception." *Penn*, 282 F.3d at 881 (citations omitted). In this appeal, the government complained that the defendant was not eligible for a reduced sentence under the "safety valve" provision because he had more than one criminal history point as calculated under §4A1.1. Specifically, the government argued that the district court erred in concluding that by granting a downward departure pursuant to §4A1.3, it was authorized to reduce the defendant's criminal history points and thereby make him eligible for sentencing under the "safety valve." The Sixth Circuit noted that the commentary to §5C1.2 is unambiguous and clearly limits a district court's authority to apply the "safety valve" provision to cases where a defendant has not more than one criminal history point as calculated under §4A1.1, regardless of whether the district court determined that a downward departure in the defendant's sentence is warranted under by §4A1.3. In the instant case, the district court's determination that the defendant was entitled to a downward departure under §4A1.3 had no effect on the defendant's criminal history score as calculated under §4A1.1. Section 4A1.3 did

not authorize the district court to add or subtract individual criminal history points from a defendant's record; instead, it merely allowed the district court to impose a sentence outside the range prescribed by the guidelines for a defendant's particular offense level and criminal history category. That is, §4A1.3 allows a district court to sentence a defendant with reference to the guideline range applicable to a defendant with another criminal history category, not to change the defendant's actual criminal history category.

United States v. Pratt, 87 F.3d 811 (6th Cir. 1996). The safety-valve provision does not authorize a downward departure without an independent basis for the departure.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Gifford, 90 F.3d 160 (6th Cir. 1996). When restitution is a separate component of the judgment, a district court can continue a defendant's restitution obligations even after revoking probation or supervised release.

United States v. Scott, 74 F.3d 107 (6th Cir. 1996). "Under the Victim and Witness Protection Act (VWPA), a court may order that a defendant provide restitution to a victim in compensation for the victim's loss. In determining whether to order restitution and in what amount, a court considers: 'the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.' A district court's discretion in fashioning restitution is not unlimited. Amounts a victim receives that reduce the loss are not to be included in the restitution amount[.] . . . The proper inquiry is whether a payment results in the victim receiving compensation for the loss." *Scott*, 74 F.3d at 110 (citations omitted).

In this case, the defendant used his position as a bank employee to defraud the bank by causing $75,546.22 (including $1,709.00 in interest on the account) to be placed into fictitious accounts that he had created. Prior to termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled the defendant to a $64,712.40 commission. He completed the transaction, and the bank retained the commission money. Upon conviction, the district court ordered the defendant to pay $74,547 in restitution to the bank. The defendant argued on appeal that the appropriate amount of restitution was $7,500, which was the loss to the bank minus the amount of the commission that he was entitled to.

The Sixth Circuit agreed and explained that the "restitution ordered by the district court was improper because it imposed restitution 'with respect to a loss for which the victim has received . . . compensation.' There is no other way to characterize . . . [the] retention of the . . . commission except as acceptance of partial compensation for the loss. . . . Whether or not [the defendant] continued working on the deal at [the bank's] behest, it was [the bank's] decision to retain [the defendant's] commission after he closed the deal and to therefore accept this compensation for its loss. . . . The restitution ordered by the district court therefore amount[ed] to

a requirement that [the defendant] compensate [the bank] for more than it ultimately lost . . ." *Id.* at 110-11 (citations omitted).

§5E1.2 Fines for Individual Defendants[1]

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000). In an appropriate case, a district court may depart downward on the basis of a "discouraged" departure factor or, more frequently, on the basis of simultaneously present, multiple "discouraged" departure factors. However, there must be credible evidence of the existence and extent of the factors relied upon by the district court.

§5H1.4 Physical Condition Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

United States v. Thomas, 49 F.3d 253 (6th Cir. 1995). The district court did not err in refusing to grant the defendant a downward departure because he was HIV positive, although he had not yet developed AIDS. The defendant argued that a downward departure was warranted because the guidelines had not taken into account recently available statistics showing the decreased life expectancy and increased cost of caring for people who are HIV positive. The circuit court agreed that these statistics were not available when the guidelines were written, but reasoned that the Commission had already considered the impact of the guidelines on persons who are HIV positive in its creation of §5H1.4. The circuit court, citing a Virginia district court's rationale concerning the relationship between §5H1.4 and a defendant with AIDS, concluded that the defendant would be entitled to a departure "if his HIV has progressed into advanced AIDS, and then only if his health was such that it could be termed as an `extraordinary physical impairment." *United States v. DePew*, 751 F. Supp. 1195, 1199 (E.D. Va. 1990), *aff'd* on other grounds, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991). The defendant was still in "relatively good health," and thus was not entitled to a departure.

[1]Section 5E1.2(i) was deleted to resolve a circuit conflict over whether a district court could impose a fine to cover the costs of imprisonment/supervised release when it had imposed a punitive fine. *See* UNITED STATES SENTENCING GUIDELINES MANUAL app. C, amend, 572.

§5H1.6 Family Ties and Responsibilities (Policy Statement)

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). "'Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines.' However, [the Sixth Circuit has] found that '[e]xtraordinary family circumstances, *i.e.*, outside of the 'heartland' of cases the [g]uidelines were intended to cover, can be the basis for a downward departure.'" *Haversat*, 22 F.3d. at 797 (citations omitted). In this case, the Sixth Circuit described exceptional family circumstances that supported a downward departure. The defendant's wife "suffered severe psychiatric problems, which have been potentially life threatening. [The defendant had] been actively involved in her care. [The wife's] treating physician. . . characterized [the defendant's] participation as an 'irreplaceable' part of [the doctor's] treatment plan for [the wife]. [The doctor] depend[ed] on [the defendant] to identify the beginning of any regressions and to seek out immediate treatment to avoid 'a serious situation.' [The doctor opined] that '[the wife] would not do well if separated from the aid of her spouse, and [the doctor] would have grave clinical concerns that her medical management could be safely continued without the ongoing presence of her spouse, even if that separation was only a matter of several weeks.'" *Id*. (citations omitted). The Sixth Circuit explained that the totality of these factors supported a downward departure.

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Truman, 304 F.3d 586 (6th Cir. 2002). In the instant case, the district court held that §5K1.1 applied and that absent a motion from the government to depart, the district court lacked the discretion to do so. On appeal, the defendant argued that §5K1.1 was not the exclusive provision for dealing with all cooperation, but rather the court may consider a defendant's cooperation not contemplated by §5K1.1 under the grant of discretion to sentencing judges embodied in §5K2.0. Relying on *United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998), the defendant argued that his cooperation was directed to state and local authorities and thus was outside the scope and limitation of §5K1.1. The Sixth Circuit noted that there was a split among the circuits as to whether the substantial assistance mentioned in §5K1.1 was limited to federal authorities. *Compare United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998); *with United States v. Love*, 985 F.2d 732 (3d Cir. 1993). However the court noted that it did not need to decide this issue nor weigh in on the circuit division in order to resolve this appeal. The court stated that, by its terms, §5K1.1 applied only to substantial assistance in connection with the investigation and prosecution of another individual who has committed a crime. Where the substantial assistance was directed other than toward the prosecution of another person, the limitation of §5K1.1–the requirement of a government motion as a triggering mechanism did not apply. The court noted that other courts had recognized this distinction and had observed that when the defendant's cooperation did not involve investigation or prosecuting another person, the government's power to limit the court's exercise of discretion to depart downward did not apply. *See e.g. United States v. Khan*, 920 F.2d 1100 (2d Cir. 1990), *cert. denied*, 499 U.S. 969 (1991). Accordingly the court held that when a defendant moved for a downward departure on the basis of cooperation or assistance to government authorities which did not involve the investigation or

prosecution of another person, §5K1.1 did not apply and the sentencing court was not precluded from considering the defendant's arguments solely because the government had not made a motion to depart. Consequently the district court erroneously concluded that it lacked discretion to consider the defendant's asserted grounds for a downward departure absent a motion from the government; the sentence was vacated and the case was remanded.

§5K2.1 Death (Policy Statement)

United States v. Mayle, 334 F.3d 552 (6th Cir. 2003). This opinion recognizes that §5K2.1 "specifically provide[s] that if death resulted from the relevant offense conduct, the court may increase the sentence above the authorized guideline range." *Mayle*, 334 F.3d at 564. A complete discussion of this opinion is provided at §4A1.3.

§5K2.2 Physical Injury (Policy Statement)

United States v. Baker, 339 F.3d 400 (6th Cir. 2003), *cert. denied*, 540 U.S. 1127 (2004). Section 5K2.2 permits an upward departure where significant physical injury resulted. In this case, the Sixth Circuit determined that a bank guard's injury did not support the enhancement. The injury occurred during a bank robbery. Even though the bank guard immediately raised his arms upon encountering the robbers, a robber shot him and kicked him in the side and teeth. As the guard lost consciousness, he heard an order to shoot him should he move. "When he stirred, he was shot at again, this time with his own .22-caliber long-rifle revolver, but was not hit. The resulting injuries were severe enough to threaten his life and to necessitate the amputation of his dominant, right arm." *Baker*, 339 F.3d at 401. The Sixth Circuit explained that "[a]ppalling as the defendants' conduct and its consequences were by the standards of any civilized person, it is no extreme outlier within the universe of robberies resulting in permanent or life-threatening injuries, for surely every such robbery is appalling. It was this universe of cases that the sentencing commission contemplated and determined to merit a six-level enhancement, not an eleven-level enhancement." *Id*. at 404.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Bond, 22 F.3d 662 (6th Cir. 1994). "The [g]uidelines state that 'extreme psychological injury' may justify an upward departure '[i]f a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense. . . .'" *Bond*, 22 F.3d at 671. In this bank robbery case, the district court relied on testimony from a victims-impact hearing and departed "because it felt that the guidelines did not account properly for the extreme degree of brutality displayed by the defendants or the mental anguish suffered by the victims." *Id*. The court of appeals determined that the evidence did not "establish § 5K2.3's requirements that the psychological injury be a 'substantial impairment' of the psychological functioning of the individual, that is of 'extended or continuous duration,' and that has manifested itself by 'physical or psychological symptoms.'" *Id*. at 672. The court's description of the evidence follows:

> The first witness, Sheryl Stanley, the branch manager of the credit union, testified as to her observations of three employees present during the robbery. Stanley stated that two of the employees, Lynda Wynes and Marion Kushner, both expressed fear and anxiety and had to be transferred to another branch for approximately two weeks after the incident. As for Alma Buck, who had had a gun held to her head, Stanley testified that Buck became very nervous after testifying at the trial (which occurred approximately one and a half years after the bank robbery) and that she took a six-week disability leave as a result. Special Agent Robert Lucas also testified concerning Ms. Buck. He stated that when he visited the credit union after the robbery, Buck broke down, cried, and expressed fear for her life. None of the victims testified at the victim-impact hearing, nor was any medical testimony presented.

Id. The court of appeals explained that this evidence showed only that "the tellers suffered anxiety for several weeks after the robbery; but this would not be unusual for any victim of an armed bank robbery." *Id*. The court of appeals stated that the fact that Ms. Buck took an extended disability leave was irrelevant because the leave was in response to having testified at trial, not as a result of the robbery.

§5K2.6 Weapons and Dangerous Instrumentalities (Policy Statement)

United States v. Bond, 22 F.3d 662 (6th Cir. 1994). "Section 5K2.6 provides that a court may increase a sentence above the authorized guideline range if a weapon or dangerous instrumentality was used, possessed, or discharged during the crime. However, because the offense conduct guideline at issue, § 2B3.1, expressly takes account of the discharge of a firearm, a departure is not justified unless 'the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense.'" *Bond*, 22 F.3d at 672. In this bank robbery case, the "district court found that the circumstances of [the robber's] discharge—narrowly missing the bank manager with a shotgun blast—and the fact that there were two separate shotgun blasts—one at the beginning and one at the end of this robbery—were aggravating factors not adequately considered by the guideline itself." *Id*. at 672-73. The Sixth Circuit disagreed. The Sixth Circuit explained that "robbers discharge firearms during robberies specifically to frighten the victims, to ensure cooperation with their demands, and to facilitate escape; the factors articulated by the district court [did] not deviate substantially from that norm." *Id*. at 673. Consequently, the district court erred by applying the adjustment.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Baker, 339 F.3d 400 (6th Cir. 2003), *cert. denied*, 540 U.S. 1127 (2004). The contours of conduct that is "unusually heinous, cruel, brutal, or degrading" for the purpose of §5K2.8 are defined by case law. In this bank robbery case, the Sixth Circuit determined that the enhancement was appropriate. The Sixth Circuit's explanation for why the offense conduct was "unusually heinous, cruel, brutal, or degrading" follows:

> The defendants in the course of their robbery did not merely shoot [the bank guard] after he had raised his hands in surrender, inflicting permanent and life-threatening injuries on him. After they had shot and disarmed him, when all reasonable possibility of resistance on [the guard's] part had vanished, they continued to brutalize him. They kicked his wounded body until he passed out, in the process moving his body a distance of about twenty to twenty-five feet across the kitchen floor. When he came to, his stirring was sufficient for the defendants to shoot at him again with his own gun, apparently following up on their threat to kill him if he moved. If the shooter's aim had been better, this could very easily have been a murder case. These subsequent, gratuitous actions by the defendants were not accounted for in the offense level calculations and are sufficiently heinous to justify an upward departure.

Baker, 339 F.3d at 405-06. This opinion contains a list of numerous cases that would be helpful in applying this guideline.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.2 Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

United States v. Hayes, 171 F.3d 389 (6th Cir. 1999). "Evidence used at sentencing may not be kept from the defendant simply by failing to incorporate it into the presentence report." *Hayes*, 171 F.3d at 393. In this case, the appellate court determined that the district court plainly erred by relying at sentencing on letters from victims which were not disclosed to the defendant. During sentencing, the court stated that it had received letters from people who were present during the defendant's bank robbery and that the court took them very seriously. The defendant and his attorney were unaware of the letters, as they were not disclosed in the presentence report. The appellate court held that Rule 32 required that the letters be disclosed and remanded for resentencing.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

United States v. Johnson, 529 U.S. 53 (2000). The Supreme Court held that under 18 U.S.C. § 3624(e), a supervised release term does not commence until an individual "is released from imprisonment." Therefore, the length of supervised release is not reduced by excess time served in prison.

United States v. Kirby, 418 F.3d 621 (6th Cir. 2005). "The district court must consider the policy statements set forth in Chapter Seven of the Sentencing Guidelines prior to imposing a sentence. The policy statements, however, are merely advisory. The district court is also required to consider the factors listed in 18 U.S.C. § 3553(a). The court need not recite these

factors but must articulate its reasoning in deciding to impose a sentence in order to allow for reasonable appellate review. *Kirby*, 418 F.3d at 626. (citations omitted).

United States v. Sparks, 19 F.3d 1099 (6th Cir. 1994). The circuit court held that Chapter Seven policy statements "are not binding on the district court, but must be considered by it in rendering a sentence for a violation of supervised release." The circuit court remanded the case, holding that the district court erred in concluding that it lacked discretion to impose anything other than a consecutive sentence for the defendant's violation of supervised release. The court joined six other circuits which recognize Chapter Seven policy statements as advisory only.

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Coatoam, 245 F.3d 553 (6th Cir.), *cert. denied*, 534 U.S. 924 (2001). The appellate court held that a court must revoke probation for refusing a drug test if it is a term of probation. Section 3565(b)(3) requires mandatory revocation if a defendant refuses to comply with drug testing as imposed by section 3563(a)(4). Section 3563(a)(4) used to require a defendant to submit to drug testing as a mandatory condition of probation, that section was renumbered and is now found at section 3565(a)(5). The new section 3563(a)(4) imposes a mandatory condition of probation on the defendants convicted of crimes of domestic violence, and requires offender rehabilitation counseling. The defendant contended that section 3565(b)(3) did not apply to him because he was not convicted of a crime of domestic violence. The appellate court rejected this argument, concluding that Congress made a simple drafting error when it designated the mandatory condition for domestic violence at section 3565(a)(4), rather than (a)(5). The correct reading of section 3565(b)(3) is that the statute requires revocation of probation for failure to submit to drug testing when a defendant is required, as a condition of probation, to submit to drug testing.

United States v. Kirby, 418 F.3d 621 (6th Cir. 2005). "[A] court may consider evidence at a revocation hearing that would be inadmissible in a criminal prosecution." *Kirby*, 418 F.3d at 628. In this case, the Sixth Circuit determined that the rule from *Crawford v. Washington*, 541 U.S. 36 (2004)—that out-of-court statements can only be used in court if the declarant was unavailable and the accused was given a prior opportunity to cross-examine the declarant.—did not apply to revocation of supervised release hearings.

United States v. Lowenstein, 108 F.3d 80 (6th Cir. 1997). "[A] court can modify the conditions of a defendant's supervised release regardless of whether the defendant has violated his existing conditions." *Lowenstein*, 108 F.3d at 85.

United States v. Throneburg, 87 F.3d 851 (6th Cir.), *cert. denied*, 519 U.S. 975 (1996). The sentencing court did not err in holding the supervised release revocation hearing two years after the issuance of the violation warrant or in imposing the resulting sentence consecutive to a state sentence being served for another crime. With respect to the timing of the revocation hearing, the court noted that the violation warrant issued well within the three year term of

supervised release and the hearing was held two years into the three-year period. The court rejected the defendant's argument that his rights were prejudiced by this delay based on the assumption that if the federal court held the hearing and imposed the 24-month sentence earlier, the state Department of Corrections would have likely paroled the defendant to the federal sentence. The court adhered to the ruling of previous courts that delay violates due process only when it impairs the defendant's ability to contest the validity of the revocation. In this case, the defendant admitted to violating the conditions of his supervised release and failed to provide support for his assertion that delay constitutes a due process violation. The court also rejected the defendant's argument that his sentence upon revocation should be served concurrently with his state sentence. Although §7B1.3 contains a policy statement directing the sentencing court to impose revocation sentences consecutively to other terms of imprisonment, the court recognized its discretion in this matter and provided an explanation as to the reason for imposing consecutive rather than concurrent sentences.

United States v. Twitty, 44 F.3d 410 (6th Cir. 1995). "[A] defendant's probation may be revoked for conduct which occurs prior to the actual commencement of the probationary sentence, but not for conduct which occurs prior to the date on which the defendant was sentenced to probation." *Twitty*, 44 F.3d at 413 (citations omitted).

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Hudson, 207 F.3d 852 (6th Cir.), *cert. denied*, 531 U.S. 890 (2000). "[W]hen assessing the penalty for a probation violation, the district court is not restricted to the range applicable at the time of the initial sentencing. Instead, the sentence need only be consistent with the provisions of subchapter A, the general provisions for sentencing set out at 18 U.S.C. §§ 3553 et seq." *Hudson*, 207 F.3d at 853.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(b)

United States v. Murdock, 398 F.3d 491 (6th Cir. 2005). In the absence of a discussion of an appellate waiver provision, a court cannot rely on a defendant's self-assessment of his understanding of a plea agreement in determining his knowledge of that plea. Another event can suffice to insure that the defendant's waiver was knowing and voluntary, but the defendant's signed assertion that he understood the plea agreement was insufficient. To uphold a waiver that was based on the defendant's signed assertion would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Rule 32

United States v. Darwich, 337 F.3d 645 (6th Cir. 2003). "On December 1, 2002, amendments to the Federal Rules of Criminal Procedure replaced Rule 32(c)(1) with Rule 32(i)(3). Rule 32(i)(3)(B) states that 'for any disputed portion of the presentence report or other

controverted matter' during sentencing, the court must 'rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing.' This new rule attempts to eliminate confusion over whether courts were required to make rulings on every objection to the PSR or only those that have the potential to affect the sentence. The new rule makes clear that controverted matters at sentencing only require a ruling if the disputed matter will affect the eventual sentence." *Darwich*, 337 F.3d at 666 (citations omitted).

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 3582

United States v. Lively, 20 F.3d 193 (6th Cir. 1994). In a case of first impression, the Sixth Circuit held that, in the creation of its sentencing table, the Sentencing Commission adequately considered the various competing policy aims of providing a definite prospect of imprisonment for economic crimes like fraud and a congressional mandate that:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation . . . .

18 U.S.C. § 3582(a). In the appeal, the defendant pleaded guilty to mail fraud for defrauding mail order companies of over $30,000 worth of merchandise. She challenged the district court's decision to impose six months of imprisonment rather than home confinement. The Sixth Circuit determined that because the defendant's sentencing range was 6-12 months, placing her in Zone B, the district court did not err in imposing a sentence of 6 months imprisonment even though the court could have sentenced the defendant to various less restrictive alternatives.

18 U.S.C. § 3583

United States v. Hancox, 49 F.3d 223 (6th Cir. 1995). "[U]nder 18 U.S.C. § 3583(g) the defendant's 'possession of a controlled substance require[s] termination of the supervised release.'" *Hancox*, 49 F.3d at 225 (citations omitted).

18 U.S.C. § 3583(e)(1)

United States v. Spinelle, 41 F.3d 1056 (6th Cir. 1994). In addressing an issue of first impression, the appellate court held that "a district court has discretionary authority to terminate a term of supervised release after the completion of one year, pursuant to 18 U.S.C. § 3583(e)(1), even if the defendant was sentenced to a mandatory term of supervised release under 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 3583(a)." The appellate court reasoned that sentencing and post-sentence modification are "two separate chronological phases," and seen as such, "the

statute mandating a specific sentence of supervised release [in this case, three years] and the statute authorizing the termination of a prior imposed sentence are quite consistent." Thus, the defendant, sentenced to a mandatory three-year term of supervised release under the provisions of the Anti-Drug Abuse Act of 1986, at 21 U.S.C. § 841(b)(1)(C) was properly sentenced, and the district court properly exercised its discretion pursuant to 18 U.S.C. § 3583(e)(1) to terminate the supervised release after the completion of one year.

18 U.S.C. § 3664(f)(1)(A)

United States v. Sosebee, 419 F.3d 451 (6th Cir. 2005). "The Victim and Witness Protection Act provides that 'in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity,' restitution may be ordered in favor of 'any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.' In cases that do not involve 'a scheme, conspiracy, or pattern of criminal activity' as an element of the crime of conviction, '[r]estitution is limited to losses caused by the specific conduct that is the basis of the offense of conviction.'" *Sosebee*, 419 F.3d at 459 (citations omitted). "[T]he Act does not require the judge to consider the defendant's financial situation in determining the amount of the restitution but only whether or not restitution should be ordered. Once the court determines that restitution is appropriate, 18 U.S.C. § 3664(f)(1)(A) requires that the court 'order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.'" *Id*. at 460 (citations omitted). This opinion explains a defendant who participated in a scheme involving bogus "charge backs" or discounts on pharmaceutical orders placed by a medical supply was required to pay restitution to the pharmaceutical manufacturer even though the manufacturer suffered no harm as a result of the offense of conviction.

18 U.S.C. § 3742

United States v. Lavoie, 19 F.3d 1102 (6th Cir. 1994). In an issue of first impression, the Sixth Circuit held that pursuant to 18 U.S.C. § 3742(a), which makes an incorrect application of the guidelines appealable, a guidelines sentence is appealable "if the appealing party alleges that the sentencing guidelines have been incorrectly applied, even in cases where the guideline ranges advocated by each of the parties overlap."